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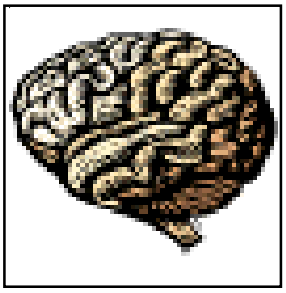
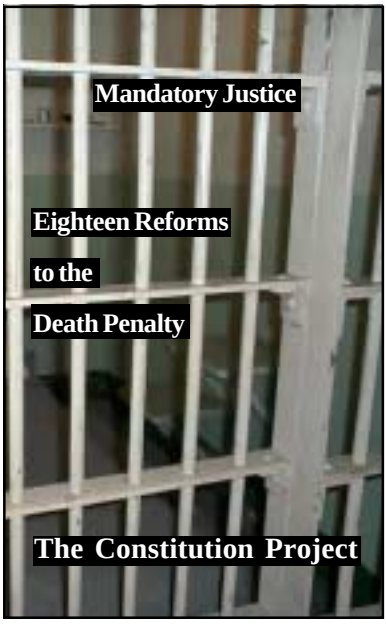
Ronald T. Crouch

Kentucky Demographics and the Kentucky Criminal Justice System

The 4Cs: Persuasive Presentation of Mental Health Evidence





How Does Kentucky Compare to National Consensus on Death Penalty Recommendations?

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The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

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FROM THE EDITOR...

Ed Monahan

Demographics. Ron Crouch applies his facts and analysis of Kentucky demographics to Kentucky's criminal justice system. Litigators, administrators, policy makers will want to take note as they plan their strategies and make their decisions.

Mental Health. Mental health evidence is often at the heart of criminal cases. Presenting mental health evidence effectively is not brain surgery. It is common sense, and with discipline and deliberation it can be presented persuasively in the criminal justice system to insure decision makers have the necessary evidence to make reliable decisions. John Blume and Pamela Blume Leonard bring us clear thinking and sound advice on how to present mental health evidence persuasively. Learn the 4Cs!

National Capital Standards. The Constitution Project has major recommendations on reforms necessary to insure the fair administration of the death penalty. In this issue, we analyze how Kentucky compares to that national consensus.

Thomas Paine's 200-year-old warning

An "avidity to punish is always dangerous to liberty."

Kentucky's New Demographic Ballgame and New Realities for Kentucky's Criminal Justice System

Ronald T. Crouch

Introduction

The Commonwealth of Kentucky is experiencing a demographic revolution with consequences that will reverberate throughout our state's institutions; government, education, health care, corrections, transportation, public safety, business, criminal justice system, etc. Kentucky, as well as the United States, has always resembled a pyramid shaped population structure with each younger generation being larger than the preceding generation. Kentucky has begun experiencing the squaring of the population pyramid and even the start of inverting the population pyramid with new generations being smaller than those of preceding generations. One hundred years ago, 1900, Kentucky's child and youth population, ages 0 to 14 was 809,000 children and youth and a century later, 2000, Kentucky's children and youth population was 824,000, virtually no growth. Kentucky's total population grew from 2,147,000 to 4,041,769, nearly doubling between 1900 and 2000! Kentucky, as the rest of the United States, is now experiencing the "middle aging" of our population.

Mark Twain is quoted as saying he wanted to live in Kentucky at the end of the world! His stated reason was that everything always happens at least 20 years later in Kentucky! In reality, Kentucky's demographic revolution is 20 years ahead rather than later! We are a "middle aging" state headed toward being an "aging" state. This is not good news or bad news, just different news. This "different news" will cause government, business and the criminal justice system to face new realities.

Rules for Data Analysis

As Kentucky faces its future, there are four rules to apply in analyzing data: critical thinking, trends, magnitude and seeing the big picture. In order to understand the past, the present and the future we must develop a framework of analysis.

Critical Thinking

First, using "critical thinking" skills. We are being overwhelmed with more and more information and data. The new reality is not getting more information and data but getting the right information and data. We need computers in all our homes, our libraries, and in classrooms, as long as they are in the back of classrooms! Many of our young have excellent computer skills, spreadsheet skills, etc. but the missing skill appears to be "critical thinking." They can get the data but the missing skill is the ability to interpret the data. Computer skills without "critical thinking" skills lead to more information and data without more understanding of the information and data.

Trends

Second, we are a "news" addicted society with what happened today being our frame of reference. It is important that we are able look at trends over time and analyze the trends to determine if something is getting better or worse. There is often a difference between "perception and reality" because "perceptions" often do not change even though "reality" does!

Apparently, our new media is not adverse to "scaring people to death" with headlines that don't match the story they are reporting. The Courier-Journal had a front-page story on December 19, 1994 titled "Increase in Murders may be just the Start." It was the second of a five part series on crime that appeared on the front page each day for five days and the large picture on the front that day showed two men wheeling out a body bag. The graph on the inside pages, however, showed that for the Louisville Metropolitan Statistical Area (MSA), a seven county area around Louisville, there were 14 murders per 100,000 people in 1974, the first year they showed murder data, and murders were down to 8 murders per 100,000 people in 1994, twenty years later, which is nearly half the rate of twenty years earlier. The trend data also showed double digit murder rates from 1974 to 1980 and dropping in to the high single digits in the 1980's and early 1990's.

In speaking a few years ago to a large group of parents and their teenage daughters about teen births in their rural Kentucky county I found the parents upset with my presentation. All I did was give them the facts. I follow the "Dragnet principle" of Sergeant Friday, "just the facts, madam." I looked out at the 100 mothers and fathers and their teenage daughters and stated that the teenage daughters were much more responsible than their mothers were when they were teenagers! In this county the teen-age birth rate was 72 births per 1,000 teenage girls in the mid 1970's and in mid 1990's had fallen to 58 births per 1,000 teenage girls. Both rates are too high but teen births were declining. The latest national data on teen births from the National Center for Health Statistics looking at 1999 data indicates that teen birth rates are the lowest every recorded in the United

States at 49.6 per 1,000 teen age girls, far below the record rates of the mid 1950's in the United States.

We appear to be waging "war" on our children and youth about how bad they are when the data may show something entirely different. When you review school statistics on school violence in Kentucky, which include classroom disruptions, suspensions, etc., you will find that a number of small rural school systems have extremely high rates compared to larger nearby middle size school systems. One has to wonder if it is a problem of "kids out of control" or "administrators out of control" in finding kids doing things wrong!

Another example of a trend that is very different than perceived is the Black murder numbers and murder rates for Kentucky. In looking at the nightly news you would think that Black murder numbers and rates were increasing dramatically. In Kentucky in 1970 (Crime in Kentucky, 1970) there were 100 Blacks who were victims of homicide, a rate of 42.2 and 5 times higher than the White murder rate of 7.9. In Kentucky in 1998 (Crime in Kentucky, 1998) there were 57 Blacks who were victims of homicide, a rate of 19.7 and 4 times higher than the White murder rate of 4.9. The murder rate among Blacks is much higher than for Whites but the Black murder numbers and murder rates when controlling for population growth are less than half of those of 30 years ago in 1970. You wouldn't know that from the nightly news would you?

Magnitude

Third, we need to look at the magnitude of the numbers and not look at them out of context. We hear much about our children and youth being killed by their classmates at school. We are afraid to send our children and youth to school because they are such violent places. However, when you look at the magnitude of the problem of deaths of children and youth nationally, the reality is far from the perception. In 1998, 14 children and youth were killed by their classmates at school! Each death was certainly tragic. In 1998, 2,000 children and youth were killed by their parent(s) or primary care giver(s) and 8,000 children and youth were killed in car accidents. Is a child or youth safer in school, in their home or in the family car? There is no comparison! Schools are very safe places when the numbers are put in context. Homes and cars are much less safe places but how many parents worry more about sending their child to school than staying in their own home or going out in the family car. It appears we underestimate the probability of a common event and overestimate the probability of a rare event!

When testifying before the Kentucky Board of Education in 2000, I raised the question of whether Kentucky would save more kids lives by putting metal detectors in schools or driver's education back in schools? Many schools have dropped driver's education but they are very concerned about school violence. Our perceptions don't always match our realities.

By the way, the same year that 14 youth were killed by their classmates across the United States, fifteen old men in Florida killed their wives and then committed suicide. There are more old women killed in Florida every year by their husbands then youth killed across the United States by their classmates. Why don't we read on the front page of our newspapers about old men killing their wives? In the Louisville area, where I reside, I know of no youth being killed in their classrooms in my 55 years, but just in the last six months two old men have killed their wives and then committed suicide. Also, there were two mass shootings by old men in retirement communities last year, just a day apart, April 18 in Michigan and April 19, 2000 in Arizona. The newspaper article on the senior shootings appeared on page A5 near the bottom of the page next to the bonus coupon ads. It took two mass shootings of senior citizens a day apart with five people dead and more wounded just to get a few inches of coverage on the inside of the newspaper. If those had been youth school shootings they would have been the front-page lead story for days with massive television news coverage!

In 1999, (Crime in Kentucky, 1999) only 36 of the 203 murders in Kentucky were listed as "felony involved." Of the remaining 167 murders; 53 resulted from arguments like at the retirement communities, 17 lover's quarrels, 2 gangland, 83 reported as other and 12 unknown. So much for the fear of stranger violence the press reports on.

The Big Picture

Fourth, we must see the "Big Picture." A business concept is SWOT analysis, looking at Strengths, Weaknesses, Opportunities and Threats. Strengths and weaknesses are internal to an organization, a community, etc. Opportunities and threats are external forces from outside that we must be aware of.

Kentucky, just as the rest of the United States, is undergoing dramatic changes. The 2000 Census indicates that Kentucky's growth is occurring in our urban areas and along our interstate highway system. Our urban area are benefiting from the presence of good roads and our more isolated rural areas are being left behind.

Major population shifts are taking place in the United States. In the last ten years domestic migration of United States citizens has been primarily to the Southeast and some additional growth in the interior West. The West Coast and the Northeast have both experienced major out migration of their domestic populations. Between 1990 and 1999 the West Coast

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experienced out migration of 1.7 million citizens and the Northeast experienced out migration of 3 million citizens. The interior West states gained 1.7 million domestic migrants and the Southeast gained 3 million domestic migrants. The growth in the West Coast was due to foreign immigrants growth of 2.5 million and the slower lost of population share in the Northeast was helped by 1.75 million foreign immigrants. In the 2000 Census, New York and Pennsylvania each lost 2 congressional seats. The Southeast gained 1.2 million immigrants but differs from most of the rest of the United States with the majority of its growth being Black and White domestic migration to the Southeast

One hundred years ago, half of all Americans lived on farms where only 2%, one in fifty, do today. We then started moving to more urban areas for employment in industrial jobs with good pay and good benefits for workers with strong backs but not requiring much education. We are now experiencing the new reality of the movement to a knowledge economy requiring less muscle power and more brainpower. This is both an opportunity and a threat for Kentucky.

New Population Realities

In the 1980's, Kentucky's population grew by only 0.7% mainly because of a 140,000 net out migration, which negated our natural increase of births over deaths. In the 1990's, Kentucky's population grew by 9.7% with a net in migration of 190,000 and a natural increase of 166,000 births over deaths for a total growth of 356,000. Kentucky's White population grew by 7.3% and Kentucky's Black population grew by 12.6%, nearly double the White rate of growth. Blacks make up 7.3% of Kentucky's population but make up 35% of Kentucky's prison population, which raises concerns with how the criminal justice system will deal with our growing Black population. All other regions of the United States; the West, the Midwest and the Northeast, lost Black population to the South during the 1990's. The trend of Blacks leaving the South in the early decades of the 20th Century has reversed with Blacks moving back to their earlier roots. Kentucky is part of this migration of Blacks back to the South. Table 1 shows the changing racial structure and age structure of Kentucky's population. Each younger group is more minority and the non-Hispanic White youth population is in significant decline.

Table 1

Population by Age, Race and Hispanic Origin; Kentucky: 2000

	Total Population	Black	% of Total	Asian	% of Total	Hispanic	% of Total
Total Population	4,041,769	295,994	7.3%	29,744	0.7%	59,939	1.5%
Under 5 years	265,901	24,044	9.0%	2,234	0.8%	6,718	2.5%
5 to 9 years	279,258	25,917	9.3%	1,948	0.7%	5,176	1.9%
10 to 14 years	279,481	24,636	8.8%	1,874	0.7%	4,198	1.5%
15 to 19 years	289,004	25,649	8.9%	1,936	0.7%	5,416	1.9%
20 to 24 years	283,032	24,947	8.8%	2,771	1.0%	8,382	3.0%
25 to 29 years	281,134	22,532	8.0%	3,713	1.3%	7,184	2.6%
30 to 34 years	286,974	21,199	7.4%	3,465	1.2%	5,661	2.0%
35 to 39 years	321,931	23,663	7.4%	2,941	0.9%	4,798	1.5%
40 to 44 years	320,734	23,633	7.4%	2,217	0.7%	3,404	1.1%
45 to 49 years	293,976	19,835	6.7%	1,812	0.6%	2,571	0.9%
50 to 54 years	262,956	14,940	5.7%	1,662	0.6%	1,937	0.7%
55 to 59 years	204,483	10,368	5.1%	1,113	0.5%	1,312	0.6%
60 to 64 years	168,112	8,649	5.1%	818	0.5%	954	0.6%
65 to 69 years	144,671	7,606	5.3%	578	0.4%	740	0.5%
70 to 74 years	129,272	6,576	5.1%	359	0.3%	591	0.5%
75 to 79 years	104,760	5,186	5.0%	157	0.1%	409	0.4%
80 to 84 years	67,829	3,285	4.8%	86	0.1%	245	0.4%
85 years and over	58,261	3,329	5.7%	60	0.1%	243	0.4%

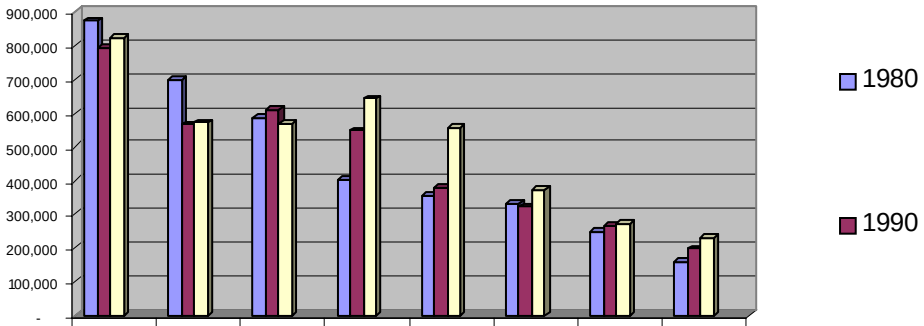
Kentucky's Hispanic population grew in the 1990's dramatically to 59,939; a 172.6% increase, in the official Census count. The number of farm workers and undocumented Mexican workers could be two to three times the official Census count since there is a high potential for an undercount of immigrants.

Kentucky is an aging state as is the United States or rather a middle aging state today! The largest age growth in Kentucky occurred in the age group 45 to 54 as the early boomers got ten years older in the last ten years. The full baby boom generation was born between 1946 and 1964 and is now, in 2001, ages 37 to 55.

Of the state's growth of 356,473 the age group 45 to 54 accounted for 174,566 or nearly half of the state's growth. Additionally, the younger boomers, ages 35 to 44 grew by 93,602 with the full group of boomers accounting for 75.2% of Kentucky's population growth, the middle aging of our population. The age group 25 to 34 actually lost 42,011 or –6.9% and is smaller than the boomer population cohort. Each younger generation is smaller in total population down to under 5 years. See Graph 1 and Table 2 for population trends, 1980 to 2000.

Graph 1

Population of Kentucky by Age
1980, 1990 and 2000



	0-14	15-24	25-34	35-44	45-54	55-64	65-74	75+
1980	873,887	700,558	585,626	404,520	354,252	332,106	248,988	160,840
1990	794,890	565,259	610,157	548,083	380,872	322,562	267,390	197,678
2000	824,640	572,036	568,108	642,665	556,932	372,595	273,943	230,850
%Change 1980-1990	-9.0%	-19.3%	4.2%	35.5%	7.5%	-2.9%	7.4%	22.9%
%Change 1990-2000	3.7%	1.2%	-6.9%	17.3%	46.2%	15.5%	2.5%	16.8%

Table 2

Population of Kentucky by Age
1980, 1990 & 2000

	1980	%	1990	%	2000	%	% Change 1980-1990	% Change 1990-2000
0-14	873,887	23.9%	794,890	21.6%	824,640	20.4%	-9.0%	3.7%
15-24	700,558	19.1%	565,259	15.3%	572,036	14.2%	-19.3%	1.2%
25-34	585,626	16.0%	610,157	16.5%	568,108	14.1%	4.2%	-6.9%
35-44	404,520	11.1%	548,083	14.9%	642,665	15.9%	35.5%	17.3%
45-54	354,252	9.7%	380,872	10.3%	556,932	13.8%	7.5%	46.2%
55-64	332,106	9.1%	322,562	8.7%	372,595	9.2%	-2.9%	15.5%
65-74	248,988	6.8%	267,390	7.3%	273,943	6.8%	7.4%	2.5%
75+	160,840	4.4%	197,678	5.4%	230,850	5.7%	22.9%	16.8%
Total	**3,660,777**		**3,686,891**		**4,041,769**		**0.7%**	**9.6%**

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It is also pretty easy to determine where our state's growth will be in the next ten years if the largest growth was 45 to 54 between 1990 and 2000, then ages 55 to 64 will be the large growth ages in the next 10 years! And a middle-aging population may result in fewer incarcerations and too many prison beds resulting in the closing of some institutions. Previous research indicates that recidivism decreases as criminals age.

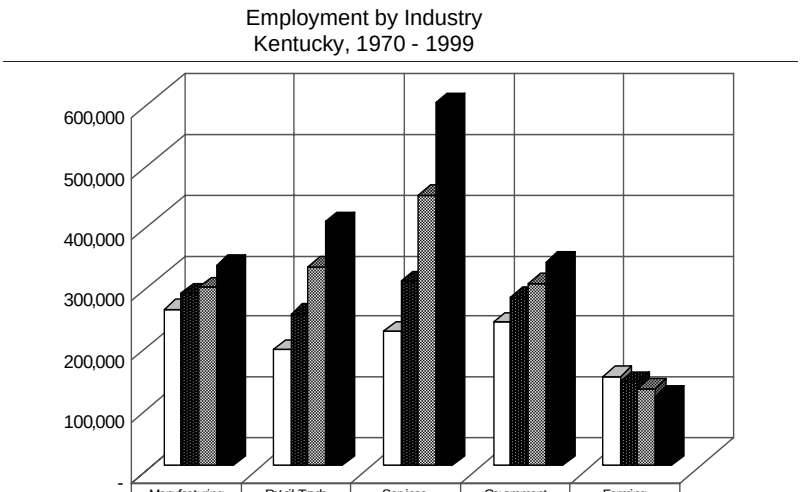
An Aging Population

We now have a middle aging population but as the baby boomers age in the next 10 to 20 years, Kentucky will become an aging population. Many of our citizens may not have the resources they will need to retire and will have to work part or full time to meet their economic needs. They may find out if they retire too early that they will run out of income before they run out of life! Can Kentucky develop policies that retrain and retool people and slow people down rather than throw them out? Living longer can be either good news or bad news based on how you look at it and how you adapt to it.

Employment and the Bubba Problem

As mentioned briefly earlier, Kentucky is moving from a Manufacturing to a Knowledge economy. In 1970, Manufacturing was Kentucky's largest employment sector followed closely by Services and Retail Trade employment. In 1999, Service employment is by far our largest employer, followed by Retail Trade and in third place is Manufacturing. Unfortunately, the new Knowledge economy will require higher educational levels but the jobs will pay less. Graph 2 indicates employment trends and wage levels for Kentucky.

Graph 2



	Manufacturing	Retail Trade	Services	Government	Farming
1970	256,361	190,903	220,430	235,549	145,530
1980	283,340	248,017	303,012	276,325	137,080
1990	294,221	326,401	444,710	299,653	125,225
1999	329,902	400,358	596,880	334,534	114,737
1999 Avg. Salary	$40,140	$16,238	$24,680	$35,176	$5,452

The new reality is that it takes two incomes for a family to make it in the Retail Trade employment area and for much of the Service employment area. In many of the Manufacturing jobs, especially in the urban areas, workers must have 15 or 20 years seniority and young workers are not being hired. Manufacturing is also becoming more automated requiring high skill workers rather than muscle power. We are not in a Manufacturing or Mining recession but a Manufacturing and Mining automation. We are manufacturing more goods and mining more coal but with fewer workers and more automation. Bubba is in a world of hurt as we enter a knowledge economy. If he is young he is going to have to stay in school get an education or if he is older he is going to have to get reeducated or retrained! Not something Bubba wants to hear. Also Bubba can be Bubba White, Joe Black or Jose Brown; he can have any skin color.

Unmarried Mothers and at Risk Kids

The plight of Bubba is leading to a dramatic increase to unmarried mothers and at risk kids. In 1970, 8.9% of Kentucky's births were to unmarried mothers and in 1999 the percent has risen to 30.4 with the highest rates in rural counties. These trends also match national trends. Table 3 shows the percent changes over the last 30 years by county. Graphs 3 and 4 show that these births are mainly to poorly educated women with a 55% out of wedlock rate for high school dropouts, a 33% rate for high school graduates only and a much lower 14% rate for women with one or more years beyond high school. Also the significant group of out of wedlock births are to women in their 20's, not teenagers.

Table 3

Kentucky % of Births to Unmarried Mothers				
	1970	**1980**	**1990**	**1999**
Kentucky	8.9	15.0	23.6	30.4
Counties				
Adair	7.4	13.2	17.3	19.9
Allen	5.5	4.9	15.3	23.1
Anderson	4.1	10.4	14.5	20.8
Ballard	8.3	8.3	20.0	24.5
Barren	6.8	10.6	17.6	24.8
Bath	6.3	13.0	17.8	21.1
Bell	8.8	15.0	24.4	27.3
Boone	3.9	7.8	17.4	21.8
Bourbon	8.9	20.9	21.6	32.8
Boyd	6.4	11.2	20.2	26.6
Boyle	11.1	16.7	24.9	32.4
Bracken	8.0	12.7	22.1	26.4
Breathitt	12.4	14.4	24.3	30.3
Breckinridge	10.0	10.5	19.0	26.8
Bullitt	3.4	11.1	21.8	27.8
Butler	5.3	8.9	17.4	20.0
Caldwell	9.9	12.4	16.1	29.2
Calloway	3.5	6.8	13.2	23.0
Campbell	6.0	12.2	26.3	32.2
Carlisle	3.8	9.1	11.7	16.9
Carroll	4.2	12.2	26.1	41.5
Carter	5.8	12.8	18.2	23.8
Casey	8.2	9.4	15.6	24.0
Christian	13.4	15.7	22.2	24.0
Clark	7.7	17.1	21.5	29.0
Clay	10.6	13.6	20.6	24.5
Clinton	8.1	7.4	14.0	26.0
Crittenden	1.6	10.5	13.3	26.7
Cumberland	5.1	16.0	19.1	32.4
Daviess	7.1	13.6	23.5	35.5
Edmonson	4.6	6.2	15.0	24.1
Elliott	8.2	12.1	15.7	25.7
Estill	8.3	13.3	19.4	30.8
Fayette	12.0	22.3	26.0	32.2
Fleming	5.8	12.6	12.6	29.9
Floyd	6.8	8.7	18.8	24.1
Franklin	11.3	11.6	23.2	33.2
Fulton	22.3	27.2	44.6	38.0
Gallatin	8.6	7.3	24.7	32.2
Garrard	11.4	13.5	21.3	21.7
Grant	9.2	7.4	24.1	26.2
Graves	8.5	11.8	19.6	27.5
Grayson	5.1	9.0	19.9	33.0
Green	6.8	9.0	21.3	24.0
Greenup	6.1	8.2	16.5	19.8
Hancock	3.1	11.3	9.1	28.8
Hardin	3.6	8.4	14.1	25.7
Harlan	13.4	14.9	23.4	29.8
Harrison	8.9	8.4	29.7	23.8
Hart	7.3	10.1	22.6	22.5
Henderson	9.1	14.0	26.2	34.1
Henry	10.3	8.5	23.2	30.5
Hickman	13.3	18.1	18.8	27.5
Hopkins	7.2	12.7	20.9	31.2
Jackson	5.3	7.3	23.0	19.1
Jefferson	13.0	25.1	34.6	40.5
Jessamine	5.6	12.6	17.4	23.3
Johnson	5.4	7.7	18.4	24.4

Continued on page 10

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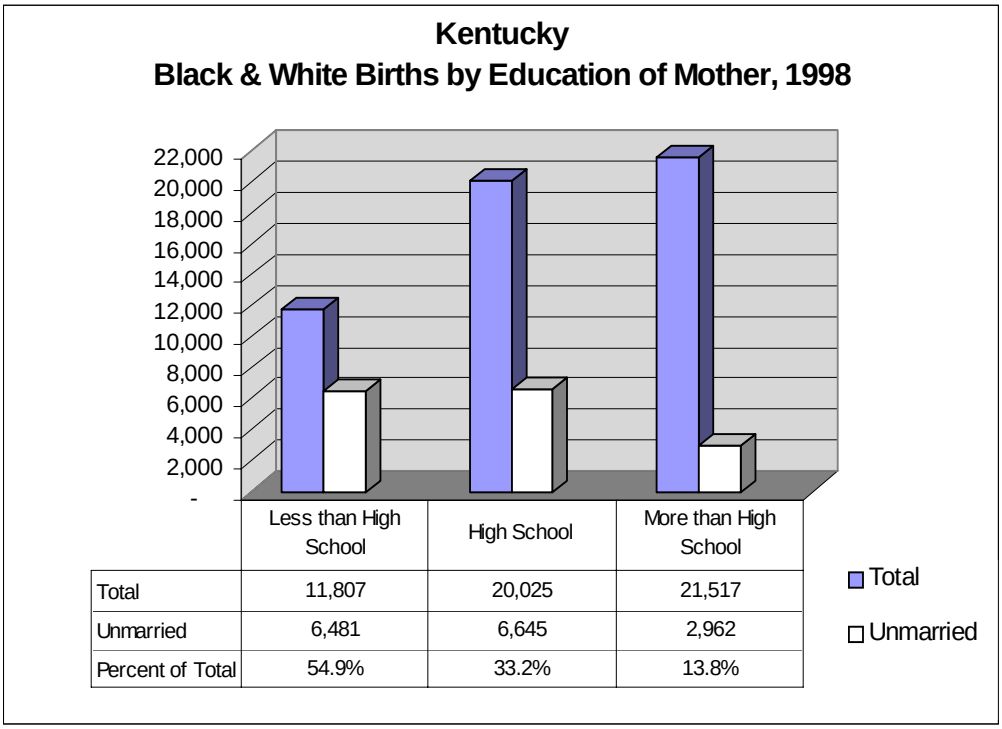
	1970	1980	1990	1999
Kenton	7.9	16.2	23.7	32.4
Knott	8.9	11.6	17.3	26.5
Knox	7.4	16.4	22.6	27.1
Larue	5.4	11.5	22.7	25.1
Laurel	4.4	9.4	16.5	23.0
Lawrence	4.1	10.0	19.5	29.4
Lee	8.5	17.0	25.6	41.4
Leslie	11.6	16.3	19.5	27.6
Letcher	8.6	9.4	21.5	28.3
Lewis	9.9	10.7	17.9	28.5
Lincoln	6.8	14.5	21.4	32.1
Livingston	4.8	5.5	16.0	25.0
Logan	7.2	16.2	19.8	28.3
Lyon	13.6	12.3	14.0	21.9
McCracken	8.1	16.7	26.9	36.7
McCreary	10.9	17.3	27.4	26.1
McLean	7.9	10.3	15.3	31.1
Madison	7.1	11.9	19.6	30.0
Magoffin	6.8	8.0	14.3	23.4
Marion	13.0	15.8	26.2	35.4
Marshall	4.9	5.5	12.7	22.4
Martin	6.6	4.8	21.5	22.3
Mason	9.4	17.8	23.8	34.9
Meade	3.5	8.1	25.2	33.0
Menifee	3.3	13.2	11.9	25.0
Mercer	4.8	12.1	16.3	29.3
Metcalfe	3.6	9.0	17.5	25.6
Monroe	3.4	15.5	24.0	30.1
Montgomery	9.7	13.4	16.9	30.1
Morgan	5.6	5.0	14.5	16.9
Muhlenberg	6.1	8.6	18.5	26.0

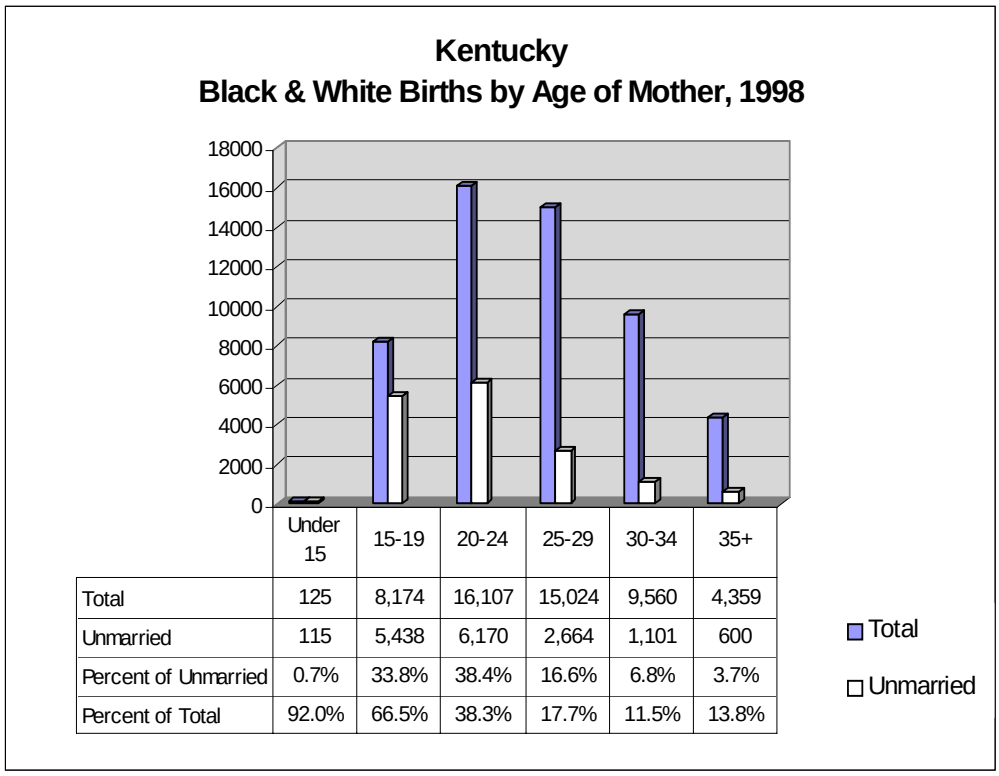
	1970	1980	1990	1999
Nelson	7.8	13.9	26.3	33.1
Nicholas	17.2	12.6	25.9	31.4
Ohio	5.9	8.6	13.8	23.5
Oldham	6.5	13.4	13.5	17.4
Owen	5.4	11.4	13.5	16.1
Owsley	10.0	12.5	26.1	17.2
Pendleton	5.6	11.2	16.7	31.4
Perry	6.3	11.6	22.4	30.1
Pike	6.6	6.9	17.8	20.5
Powell	4.5	9.6	27.0	37.4
Pulaski	5.2	9.3	16.4	27.6
Robertson	13.8	11.8	22.7	44.0
Rockcastle	5.4	11.3	20.3	24.7
Rowan	5.1	10.8	13.3	30.2
Russell	5.3	9.4	15.5	22.7
Scott	6.6	12.1	18.7	25.7
Shelby	10.1	15.5	21.6	28.4
Simpson	8.2	17.5	24.7	34.7
Spencer	5.3	10.7	13.0	20.8
Taylor	8.9	10.1	16.7	31.4
Todd	7.6	11.4	23.0	26.3
Trigg	12.6	14.3	23.9	24.6
Trimble	3.2	8.3	14.8	24.0
Union	10.0	12.3	26.2	31.6
Warren	7.1	14.4	24.9	31.1
Washington	15.0	13.4	19.4	35.9
Wayne	7.2	9.6	19.1	27.6
Webster	6.5	10.0	24.6	29.9
Whitley	4.7	10.1	24.0	26.7
Wolfe	15.7	8.5	16.8	29.6
Woodford	7.5	13.3	17.4	18.1

Graph 3



	Less than High School	High School	More than High School
Total	11,807	20,025	21,517
Unmarried	6,481	6,645	2,962
Percent of Total	54.9%	33.2%	13.8%

Graph 4



	Under 15	15-19	20-24	25-29	30-34	35+
Total	125	8,174	16,107	15,024	9,560	4,359
Unmarried	115	5,438	6,170	2,664	1,101	600
Percent of Unmarried	0.7%	33.8%	38.4%	16.6%	6.8%	3.7%
Percent of Total	92.0%	66.5%	38.3%	17.7%	11.5%	13.8%

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New Questions for a New Demographic and Economic Ballgame

Some questions will have to be asked concerning who will be our future workforce as our population ages.

1. Will adult education and training become a major and growing need?
2. How will our criminal justice system make sure inmates have the education for the new economy?
3. How do we address the "Bubba problem"?
4. Is incarceration or rehabilitation the answer to an at risk population?
5. Will an aging population turn to crime if they outlive their pensions and retirement savings?
6. What will be the costs of sick care for an aging population both in and out of state institutions and who will pay for it?

We are going to have to ask and answer some new questions! This is not good or bad news, just different news that will require us to think and act differently!

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Ronald T. Crouch, MSW, MBA, MA, is Director of the Kentucky State Data Center at the Urban Studies Institute, University of Louisville. The KSDC is a federal-state cooperative effort that acts as an information clearinghouse for the Census Bureau and other data sources. It is operated by the Urban Studies Institute under the auspices of the Governor's Office for Policy and Management in collaboration with the KY Department of Library and Archives. Ron was an instructor at the Kent School of Social Work for ten years. He makes frequent demographic presentations in Kentucky and nationally. He is the author of numerous books, journal articles and technical reports. ■

Black and White: One Sentence Makes a Difference in the Results of Two Mock Juries

Inese A. Neiders, Ph.D., J.D.

We used two mock juries to evaluate a recent case in Ohio. We recommend the use of more than one mock jury when funding is available.

A physician was indicted on rape charges brought by a patient. The jurors in each group were presented with the facts of the case. Since it was not clear what evidence would be allowed by the judge, the jurors were given several different fact patterns. It was not clear that the defense lawyers would be able to suppress some evidence which they thought would be critical.

Everything presented to each mock jury was the same except for one sentence. The first mock jury was told that the physicians had two sons—Tom and Robert. The other jury was told that the physician had two sons—Karim and Ghazi.

The result was not a surprise, however, it was disappointing. The mock jury was an "elite" mock jury. Therefore, the group was selected because it was thought that they were more likely to become jury forepersons. They had better positions at work, and more education. They had been selected for their ability to analyze and help build the case. The mock jurors who were told the client was non-white were more likely to find the defendant guilty.

The juror for this particular case were not concerned that the victim had used a wire. The information obtained from the wire could, however, be construed in several different ways by a few of the mock jurors.

With these mock jurors it was clear that they were more likely to believe the physician if there was only one victim. When they were given a hypothetical about more victims, they were much less likely to find the physician not guilty.

Because of this information, the client could be advised of his greater risk. More precautions could be taken during the *voir dire* process, the opening statement and other parts of the trial. The jury consultant was reinforced that she would have to do more work to arrive at the same result that one would get for a white physician.

In this particular situation, the physician was offered a plea involving no prison time after much negations on the part of the lawyers. It was decided that it was best to take the plea for this particular case.

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Dr. Neiders frequently travels to assist with jury selection. She would like to thank Cynthia Thacker Schaefer of Dayton, Ohio for her work as a detective on this case as well as other cases. Because of the quality of her work, many clients have received no time in prison. ■

How Does Kentucky Compare to the National Consensus on Fair Administration of Death Penalty?

The Constitution Project has issued *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001) http://www.constitutionproject.org/dpi/MandatoryJustice.pdf. The Project's death penalty initiative and its bipartisan, blue ribbon committee issued this major national report. The Report was published after the group conducted a yearlong review of the death penalty in the United States.

The 30-member death penalty initiative was composed of both supporters and opponents of the death penalty. It included former judges, state attorneys general, federal prosecutors, law enforcement officials, governors, mayors, and journalists, as well as current defense attorneys, religious leaders, victims' rights advocates, Republicans and Democrats, conservatives and liberals. Co-Chairs of this 30-member group were: Charles F. Baird *former Judge, Texas Court of Criminal Appeals*, Gerald Kogan, *former Chief Justice, Supreme Court of the State of Florida; former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida*, Beth A. Wilkinson**,** *Prosecutor, Oklahoma City bombing case.* William Sessions FBI Director in the Reagan and Bush administrations was a member.

Their report is a comprehensive consensus on capital punishment reached by an ideologically and politically diverse group with extensive death penalty and criminal justice experience. One of its co-chairs, Judge Baird, has recently come to Kentucky and addressed the Kentucky Criminal Justice Council on the work of this national effort. The Report recommended 18 reforms to insure the fair administration of the death penalty:

The extent to which Kentucky is in or out of compliance with these Reforms is indicated after each reform in italics.

Effective Counsel

1) Creation of Independent Appointing Authorities

Each state should create or maintain a central, independent appointing authority whose role is to "recruit, select, train, monitor, support, and assist" attorneys who represent capital clients (ABA Report). The authority should be composed of attorneys knowledgeable about criminal defense in capital cases, and who will operate independent of conflicts of interest with judges, prosecutors, or any other parties. This authority should adopt and enforce a set of minimum standards for appointed counsel at all stages of capital cases, including state or federal post-conviction and *certiorar*i. An existing statewide public defender office or other assigned counsel program should meet the definition of a central appointing authority, providing it implements the proper standards and procedures.

✓ *For state cases, Kentucky has a central, independent appointing authority to appoint and educate attorneys representing capital clients in the statewide indigent defense program, the Department of Public Advocacy (DPA), via KRS Chapter 31. DPA has adopted the National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation (1995) and selected portions of the American Bar Association Guidelines for Appointment and Performance of Counsel in Death Penalty Cases (1989) as its performance standards in capital trial and post-trial cases. DPA believes that it is necessary to have these appointment guidelines as a part of its standards but DPA has not adopted the portion of the ABA Guidelines that apply to the appointment of counsel in capital cases because DPA does not currently have the funding to meet these appointment standards. DPA has proposed to a federal Workgroup that it be designated the appointing authority for capital federal habeas cases.*

1) Provision of Competent and Adequately Compensated Counsel at All States of Capital Litigation and Provision of Adequate Funding for Expert and Investigative Services

Every capital defendant should be provided with qualified and adequately compensated attorneys at every stage of the capital proceeding, including state and federal post-conviction and *certiorar*i. Each jurisdiction should adopt a stringent and uniform set of qualifications for capital defense at each stage of the proceedings. Capital attorneys should be guaranteed adequate compensation for their services, at a level that reflects the "extraordinary responsibilities inherent in death penalty litigation" (ABA Report). Such compensation should be set according to actual time and service performed, and should be sufficient to ensure that an attorney meeting his or her professional responsibility to provide competent representation will receive compensation adequate for reasonable overhead; reasonable litigation expenses; reasonable expenses for expert, investigative, support, and other services; and a reasonable return.

✓ *Kentucky has made significant strides in providing qualified and adequately compensated attorneys at every stage of the capital proceeding with DPA's increase in resources. However, DPA does not yet have the resources necessary to fully meet this recommendation. The primary unmet need in capital defense for Kentucky public defenders is at the trial level. At the present time, capital cases are handled primarily by local trial offices. The Capital Trial Branch located in the central office in Frankfort cannot handle the 50-90*

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potential capital cases that occur each year. The local trial attorneys carry caseloads averaging 420 new cases per lawyer per year. These caseloads make it exceptionally difficult to accommodate the handling of a capital case. DPA is currently proposing for the next biennium's budget the creation of regional capital teams consisting of a lawyer, an investigator, and a mitigation specialist located in each of the 5 trial regions. This will take the caseload pressure off the local trial offices, while at the same time ensuring that an adequately educated and experienced trial lawyer is handling the defense. In addition, DPA proposes the addition of 1 lawyer whose job it is to represent the persons on death row as they appeal their convictions. DPA represents all of the persons presently on death row. This is time-consuming and complex work. DPA's proposal would cost $607,490 in the first year, and $990,272 in the second year of the biennium. Kentucky citizens continue to want to have the death penalty as a possible penalty. In order to accommodate this, it is imperative that an adequate defense is provided to those persons charged with and convicted of capital crimes.

3) Replacement of the *Strickland v. Washington* Standard for Effective Assistance of Counsel at Capital Sentencing

Every state that permits the death penalty should adopt a more demanding standard to replace the current test for effective assistance of counsel in the capital sentencing context. Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case, and possess adequate time and resources to prepare. (NLADA Standards)

Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney's incompetence. Moreover, there should be a strong presumption in favor of the attorney's obligation to offer at least some mitigating evidence.

✓ *Kentucky follows the Strickland standard. Death sentences have been affirmed using this difficult standard of proof, Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000); Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001).*

Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides

To reduce the unacceptably high risk of wrongful execution in certain categories of cases, to ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty, jurisdictions should limit the cases eligible for capital punishment to exclude those involving (1) persons with mental retardation; (2) persons under the age of eighteen at the time of the crimes for which they were convicted; and (3) those convicted of felony murder who did not kill, intend to kill, or intend that a killing occur.

✓ *Kentucky law now allows the death penalty and life without the possibility of parole for 25 years for children 16 and 17 years of age who are convicted of a capital crime. KRS 640.040. Since 1976, three children under 18 have been sentenced to death in Kentucky. One of these three was black. The Kentucky Supreme Court reversed two of these. Ice v. Commonwealth, Ky., 667 S.W.2d 671 (1984) and Osborne v. Commonwealth, Ky., 43 S.W.3d 234 (2001). Osborne faces retrial for death. The Kentucky Supreme Court and the United States Court of Appeals for the Sixth Circuit have affirmed Kevin Stanford's case. Kevin Stanford was a 17 year old black juvenile at the time he was convicted of murder, robbery, sodomy and theft in 1981 in Louisville. His co-defendants, Troy Johnson and David Buchanan, were 17 and 16 years old respectively. Johnson, the oldest of the three, received 9 months in juvenile detention. Buchanan received a life sentence plus two 20-year sentences for rape and robbery. Kevin was tested in the 5th grade and again in 1978 with an IQ of 70. Since being sentenced to death, he has been diagnosed by psychologists as suffering from post-traumatic stress disorder from the repeated sexual assaults and emotional neglect that pervaded his childhood. When arrested, Kevin was bombarded with racial slurs and epithets by police officers. His victim was a white woman. The jurors who sentenced him to die were all white. Louisville was saturated with prejudicial publicity about the crime. Kevin had no defense to the crime presented for him despite the availability of a substantial defense. In contrast, the co-defendant's attorney presented evidence on his client's prior juvenile treatment and mental health problems.*

✓ *Kentucky precludes the death penalty for those found mentally retarded but the law KRS 532.130, 532.135, and 532.140 but it only applies to trials commenced after July 13, 1990 so there may be some on Kentucky's death row who were tried prior to this date.*

✓ *Kentucky does not have the felony murder rule. Kentucky allows a death sentence to be imposed on a nontriggerman who brokers the murder of another, Perdue v. Commonwealth, Ky., 916 S.W.2d 148 (1995), if done for profit. Young v. Commonwealth, Ky., 50 S.W.3d 148 (2001).*

Expanding and Explaining Life without Parole (LWOP)

1) Availability of Life Sentence without Parole

In all capital cases, the sentencer should be provided with the option of a life sentence without the possibility of parole.

✓ *Kentucky has a sentence of life without parole as of July 15, 1998. KRS 532.030(4).*

2) Meaning of Life Sentence without Parole (Truth in Sentencing)

At the sentencing phase of any capital case in which the jury has a role in determining the sentence imposed on the defendant, the court shall inform the jury of the minimum length of time those convicted of murder must serve before being eligible for parole. However, the trial court should not make statements or give instructions suggesting that the jury's verdict will or may be reviewed or reconsidered by anyone else, or that any sentence it imposes will or may be overturned or commuted.

✓ *Kentucky jurors are not instructed that if they sentence a person to life imprisonment without parole that the person will never be released from prison although voir dire touches on penalties.*

Safeguarding Racial Fairness

Each jurisdiction should undertake a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system. Because these issues are so complex and difficult, two approaches are appropriate. One very important component – perhaps the most important – is the rigorous gathering of data on the operation of the capital punishment system and the role of race in it. A second component is to bring members of all races into every level of the decision-making process.

✓ *Kentucky has a Racial Justice Act, which does not apply to death sentences imposed prior to July 15, 1998. KRS 532.300, KRS 532.305.*

✓ *Members of all races in Kentucky are not sufficiently brought into every level of the decision making process Kentucky is required to follow Batson v. Kentucky, 476 U.S. 79 (1986) but in the 25 years since Batson was decided, there is but one reversal by a Kentucky appellate court of a case due to a Batson challenge.*

✓ *The Kentucky Supreme Court has not found relevant a statewide study of capital cases over 15 years indicating there is racial discrimination in the imposition of the death sentence in Kentucky. Bussell v, Commonwealth, Ky., 882 S.W.2d 111, 115 (1994).*

✓ *Kentucky has had studies done to assess whether race is an inappropriate factor in the imposition of the death penalty and those studies have uniformly shown race is an inappropriate factor. The last study looked at cases from 1976 – 1991. It is time for another comprehensive study to be conducted.*

Proportionality Review

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner; (2) provide a check on broad prosecutorial discretion; and (3) prevent discrimination from playing a role in the capital decision-making process, every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner.

✓ *Comprehensive proportionality review does not occur in Kentucky. The Kentucky Supreme Court is required to collect Kentucky's Supreme Court is required to review every capital case for "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." KRS 532.075(3)(c). "The court shall include in its decision a reference to hose similar cases which it took into consideration. KRS 532.075(5) But the Court is only required to keep records on and only takes into consideration cases where death has been imposed. KRS 532.075(6). It does not take into account cases where death was not imposed. See, e.g., Harper v. Commonwealth, Ky., 694 S.W.2d 665 (1985). The proportionality review process is in actuality minimal. See, e.g, Mills v. Commonwealth, Ky., 996 S.W.2d 473(1999).*

Protection against Wrongful Conviction and Sentence

1) Preservation and Use of DNA Evidence to Establish Innocence or Avoid Unjust Execution

In cases where the defendant has been sentenced to death, states and the federal government should enact legislation that requires the preservation and permits the testing of biological materials not previously subjected to effective DNA testing, where such preservation or testing may produce evidence favorable to the defendant and relevant to the claim that he or she was wrongfully convicted or sentenced. These laws should provide that biological materials must be generally preserved and that, as to convicted defendants, existing biological materials must be preserved until defendants can be notified and provided an opportunity to request testing under the jurisdiction's DNA testing requirements. These laws should provide for the use of public funds to conduct the testing and to appoint counsel where the convicted defendant is indigent. If exculpatory evidence is produced by such testing, notwithstanding other procedural bars or time limitations, legislation should provide that the evidence may be presented at a hearing to determine whether the conviction or sentence was wrongful. If the conviction or sentence is shown to be erroneous, the legislation should require that the conviction or sentence be vacated.

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2) Lifting Procedural Barriers to Introduction of Exculpatory Evidence

State and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence.

✓ *Procedural limitations in Kentucky should be relaxed where the results show an innocent man is in prison. Presently, there is a 3 year standard under RCr 11.42 and a 1 year under RCr 10.06 or more "if the court for good cause permits." This should be relaxed to allow for the release of an innocent person at any time the evidence is produced DNA testing should be available to persons who make a showing to a court that: A reasonable probability exists that the inmate would not have been prosecuted or convicted if the exculpatory evidence had been obtained through DNA testing. If the evidence would be relevant to the correctness of the sentence, or if it would be helpful to establishing an erroneous conviction, testing should be available. Evidence to be tested is still in existence. Evidence was not previously tested, or if it was, new testing is now available. State should provide counsel for persons who make this showing. Biological material needs to be saved while the person is incarcerated. If the Commonwealth seeks to destroy the crime scene biological evidence, it should only be accomplished after notice and an opportunity to petition the court for testing. Biological evidence itself rather than results should be stored to accommodate new technology. The Kentucky Criminal Justice Council Interim Report (July 2001) unanimously recommended "legislation to adequately fund and support the collection, testing and preservation of DNA evidence to ensure its availability to prosecution and defense in a timely manner in capital cases. It is further recommended that the legislation comply with federal guidelines for incentive funding."*

<u>Duty of Judge and Role of Jury</u>

1) Eliminating Authorization for Judicial Override of a Jury's Recommendation of a Life Sentence to Impose a Sentence of Death

Judicial override of a jury's recommendation of life imprisonment to impose a sentence of death should be prohibited. Where a court determines that a death sentence would be disproportionate, where it believes doubt remains as to the guilt of one sentenced to death, or where the interests of justice require it, the trial court should be granted authority to impose a life sentence despite the jury's recommendation of death.

✓ *Jurors fix the sentence in Kentucky. A judge can lower the sentence within limits. A judge cannot sentence a defendant to death unless a jury has recommended a death sentence. Ward v. Commonwealth, Ky., 695 S.W.2d 404, 407 (1985). No Kentucky trial judge has sentenced a defendant to death unless the jurors fixed the sentence at death. No Kentucky trial judge has ever reduced a jury sentence of death to a lesser penalty even though the judge has the statutory authority to do so. When a Kentucky capital jury deadlocks on penalty, the Commonwealth is permitted to conduct another penalty phase. Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985). When a defendant who is not sentenced to death by a jury and then prevails on appeal, his retrial can include the possibility for a death sentence. Eldred v. Commonwealth, Ky., 973 S.W.2d 43 (1998).*

2) Lingering (Residual) Doubt

The trial judge, in each case in which he or she deems such an instruction appropriate, should instruct the jury, at the conclusion of the sentencing phase of a capital case and before the jury retires to deliberate, as follows: "If you have any lingering doubt as to the defendant's guilt of the crime or any element of the crime, even though that doubt did not rise to the level of a reasonable doubt when you found the defendant guilty, you may consider that doubt as a mitigating circumstance weighing against a death sentence for the defendant."

✓ *This instruction is not given in Kentucky capital cases and Kentucky does not currently require it be given. Bussell v. Commonwealth, Ky., 882 S.W.2d 111, 115 (1994) determined that the failure to instruct on residual doubt is not reversible error and stated, "Residual doubt of guilt is not a mitigating circumstance."*

3) Ensuring That Capital Sentencing Juries Understand Their Obligation to Consider Mitigating Factors

Every judge presiding at a capital sentencing hearing has an affirmative obligation to ensure that the jury fully and accurately understands the nature of its duty. The judge must clearly communicate to the jury that it retains the ultimate moral decision-making power over whether the defendant lives or dies, and must also communicate that (1) mitigating factors do not need to be found by all members of the jury in order to be considered in the individual juror's sentencing decision, and (2) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror's sentencing decision. In light of empirical evidence documenting serious juror confusion on the nature of the jury's obligation, judges must ensure that jurors understand, for example, that this decision rests in the jury's hands, that it is not a mechanical decision to be discharged by a numerical tally of aggravating and mitigating factors, that it requires the jury to

consider the defendant's mitigating evidence, and that it permits the jury to decline to sentence the defendant to death even if sufficient aggravating factors exist.

The judge's obligation to ensure that jurors understand the scope of their moral authority and duty is affirmative in nature. Judges should not consider it discharged simply because they have given standard jury instructions. If judges have reason to think such instructions may be misleading, they should instruct the jury in more accessible and less ambiguous language. In addition, if the jury asks for clarification on these difficult and crucial issues, judges should offer clarification and not simply direct the jury to reread the instructions.

✓ *Kentucky capital jurors are not fully instructed on their duties and responsibilities. They are not required to be instructed that: (1) mitigating factors do not need to be found by all members of the jury in order to be considered in the individual juror's sentencing decision, and (2) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror's sentencing decision. Kentucky jurors are not required to weigh mitigating against aggravating factors. There is no requirement to give an instruction to jurors on many mitigating factors like abuse, neglect, dysfunctional family upbringing, drug addiction. The current Kentucky instruction to jurors as to mitigation is: "In fixing a sentence for the defendant for the offense of [murder/kidnapping] you shall consider such mitigating or extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true, including but not limited to such of the following as you believe from the evidence to be true:…. In addition to the foregoing, you shall consider also those facts and circumstances of the particular offense of which you have found him guilty, about which he has offered evidence in mitigation of the penalty to be imposed upon him and which you believe from the evidence to be true."*

Role of Prosecutors

1) Providing Expanded Discovery in Death Penalty Cases and Ensuring That in Death Penalty Prosecutions Exculpatory Information Is Provided to the Defense

Because of the paramount interest in avoiding the execution of an innocent person, special discovery provisions should be established to govern death penalty cases. These provisions should provide for discovery from the prosecution that is as full and complete as possible, consistent with the requirements of public safety.

Full "open-file" discovery should be required in capital cases. However, discovery of the prosecutor's files means nothing if the relevant information is not contained in those files. Thus, to make discovery effective in death penalty cases, the prosecution must obtain all relevant information from all agencies involved in investigating the case or analyzing evidence. Disclosure should be withheld only when the prosecution clearly demonstrates that restrictions are required to protect witnesses' safety or shows similarly substantial threats to public safety.

If a jurisdiction fails to adopt full open-file discovery for its capital cases, it must ensure that it provides all exculpatory *(Brady*) evidence to the defens*e.* In order to ensure compliance with this obligation, the prosecution should be required to certify that (1) it has requested that all investigative agencies involved in the investigation of the case and examination of evidence deliver to it all documents, information, and materials relevant to the case and that the agencies have indicated their compliance; (2) a named prosecutor or prosecutors have inspected all these materials to determine if they contain any evidence favorable to the defense as to either guilt or sentencing; and (3) all arguably favorable information has been either provided to the defense or submitted to the trial judge for *in camera* review to determine whether such evidence meets the *Brady* standards of helpfulness to the defense and materiality to outcome. When willful violations of *Brady* duties are found, meaningful sanctions should be imposed.

✓ *Kentucky does not require open file discovery in capital cases. Discovery is limited to what is set out in RCr. 7.24 and 7.26. The prosecutor is not required to give statements of witnesses in discover until 48 hours prior to trial. See RCr 726. It is up to each individual judge to decide what is exculpatory evidence that must be turned over to the defense. The prosecution is not required to affirmatively seek from others who may possess arguably exculpatory evidence. In Kentucky, a defendant sentenced to death is not entitled to discovery in his state post-conviction action. Foley v. Commonwealth, Ky., 17 S.W.2d 878, 889 (2000).*

2) Establishing Internal Prosecutorial Guidelines or Protocols on Seeking the Death Penalty Where Questionable Evidence Increases the Likelihood That the Innocent Will Be Executed

Because eyewitness identifications by strangers are fallible, co-defendants are prone to lie and blame other participants in order to reduce their own guilt or sentence, and jailhouse informants frequently have the opportunity and the clear motivation to fabricate evidence to benefit their status at the expense of justice, prosecutors should establish guidelines limiting reliance on such questionable evidence in death penalty cases. The guidelines should put that penalty off limits where the guilt of the defendant or the likelihood of receiving a capital sentence depends upon these types of evidence and where independent corroborating evidence is unavailable.

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✓ *No prosecutorial guidelines exist in Kentucky to limit the discretion of the local elected prosecutor to see to prosecute a case as capital. The Commonwealth Attorney has total discretion in making the capital charging decision.*

3) Requiring Mandatory Period of Consultation before Commencing Death Penalty Prosecution

Before the decision to prosecute a case capitally is announced or commenced, a specified time period should be set aside during which the prosecution is to examine the propriety of seeking the death penalty and to consult with appropriate officials and parties.

✓ *Kentucky law does not currently require this. Trials have been held as early as 6 months after indictment. See Hunter v. Commonwealth, Ky., 869 S.W.2d 719 (1994).*

II. Kentucky Criminal justice Council Makes Capital Recommendations

The Kentucky Criminal Justice Council Capital committee unanimously recommended and the Council approved two related recommendations:

1) A comprehensive statewide study to address:

- Delay in implementing the penalty imposed and consideration of reforms in the review process to make it more timely (revision of RCr 11.42 and possible recommendation to Kentucky Supreme Court regarding stay practice);
- Incorporate balanced and systemic input, including prosecution and defense and victims' families, into any study;
- Effective assistance of counsel (minimum standards, certification) and training for trial judges;
- Access to DNA evidence;
- Evidentiary issues, e.g. jailhouse informant testimony identified as a problem in other jurisdictions; uncorroborated eye witness testimony; unrecorded confessions;
- Resources for prosecution and defense (establishment of special teams, representation/investigation experts);
- Prosecutor discretion in seeking death penalty; adaptation of federal guidelines or procedures in other states; independent review team to ensure statewide consistency in considering factors of race, geography, gender, economic status, age, cognitive abilities, and aggravating circumstances/level of culpability; and
- Jury selection and jury instruction in death penalty cases; educating potential jurors on trial process and overall operation of criminal justice system; and criminal background checks of jurors in death penalty cases.

2) Legislation to adequately fund and support the collection, testing and preservation of DNA evidence to ensure its availability to prosecution and defense in a timely manner in capital cases. It is further recommended that this legislation comply with federal guidelines for incentive funding. ■

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All men dream, but not equally. Those who dream by night in the dusty recesses of their minds Awake to find that it was vanity; But the dreamers of the day are dangerous men, That they may act their dreams with open eyes to make it possible.

— T.E. Lawrence

Principles of Developing and Presenting Mental Health Evidence in Criminal Cases

by John H. Blume and Pamela Blume Leonard

Authors' Note

In this article, we will attempt to provide a general framework for developing and presenting mental health evidence in criminal cases. It is intended to complement "The Elements of a Competent and Reliable Mental Health Examination,[1] which described a process for acquiring an accurate assessment of a client's mental condition and set mental health issues within the constitutional framework. We suggest you read that article carefully. It provides suggestions for obtaining a favorable mental health evaluation in the first instance. Obviously, without a favorable evaluation, there will be little mental health evidence to present. The suggestions in both articles are widely applicable to criminal defense and, in our view, are specifically relevant to death penalty cases where the development and presentation of mental health evidence are frequently the difference between life and death.

Introduction

Mentally disordered clients can be challenging, their crimes bizarre, their lives tragic and their illnesses difficult to convey. To address mental health issues competently and effectively, defense counsel must understand the wide range of mental health issues relevant to criminal cases, recognize and identify the multitude of symptoms that may be exhibited by our clients, and be familiar with how mental health experts arrive at diagnoses and determine how the client's mental illness influenced his behavior at the time of the offense. Without this knowledge, it is impossible to advocate effectively for a mentally ill client or to overcome jurors' cynicism about mental health issues. We believe juror skepticism often reflects inadequate development and ineffective presentation rather than a biased refusal to appreciate the tragic consequences of mental illness.

For our purposes, the term "mental health issues" encompasses the diagnosis and treatment of mental illnesses and mental retardation. The information in this article will be useful in all of those areas but it predominantly offers guidance in litigating cases involving mental illness. (Substance abuse and addiction are recognized as a forms of mental illness but they are complex subjects that are beyond the scope of this article. However, since a great deal of substance abuse has its origins in clients' efforts to self medicate and quell the disturbing symptoms of mental illness, it behooves counsel to recognize and understand the mental illnesses that underlie addition.)

Obviously, all of the steps discussed in this article must be adjusted to the particular client and the facts of the case. However, even though every case is unique, we believe there are four principles that must be applied to the development and presentation of mental health evidence in all cases, especially those involving the death penalty. Conveniently, they all start with the letter C.

"4 Cs": Basic Principles of Developing and Presenting Mental Health Issues

There are no shortcuts to developing and presenting mental health evidence effectively in a criminal case. You must build a theory of defense based upon evidence that is **credible, comprehensive, consistent and comprehensible**. These principles must not be compromised at any stage of litigation. We encourage you to constantly evaluate your evidence and your advocacy in light of these "4 Cs".

1. **Is your evidence CREDIBLE?** Have you supported your theory with a thorough life history investigation, life history documents, lay witnesses and expert witnesses?
2. **Is your evidence COMPREHENSIVE?** Have you applied your evidence of mental health issues at every stage of litigation, including your relationship and meetings with your client, every motion, court appearance and meeting with the government?
3. **Is your evidence CONSISTENT?** Have you formulated and communicated a unified theory of the case that takes into account all the facts and circumstances about the client and the offense and tells the same story at every stage of litigation?
4. **Is your evidence COMPREHENSIBLE?** Have you presented your evidence in ordinary language in a common sense manner?

Developing and Presenting Credible Evidence

Learn About Mental Health Issues. Once you have a working knowledge of several fundamental precepts of mental health issues and mentally ill clients, you will be able to develop and present credible evidence to the jury. You can convince jurors to walk a mile in the defendant's shoes if you have learned everything you can about your client's mental illness and its role in a tragic crime. Armed with the insight and empathy that knowledge brings, you can convincingly convey mental illnesses as involuntary impairments that affect the simplest aspects of ordinary life. There is no shortcut to being a persuasive advocate for a mentally ill criminal defendant.

To adequately represent a mentally ill client, every member of the defense team must become a student of mental health issues. Initially, this includes acquiring a general understanding as well as specific knowledge of the defendant's past and

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present mental illness(es) before determining how to litigate the case and mastering a new vocabulary that will allow you to present complicated medical and psychological issues in a comprehensible manner to the judge and to each individual on the jury. Excellent starting places are the web sites for National Institute of Mental Health and National Alliance for the Mentally Ill[2], where you will find plain language descriptions of mental illnesses as well as links to journals, studies and other helpful web sites. *The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV)[3], published by The American Psychiatric Association, and *Comprehensive Textbook of Psychiatry*[4] by Kaplan and Saddock are essential references for understanding mental health issues. Most cases will require additional particularized research. Web sites for every major mental disorder will give you a basic introduction to the nature and impact of your clients' impairments.

Identify Mental Health Issues

Accurate identification and meticulous documentation of your client's mental health issues are necessary steps to building **credible** evidence.

Look for Indications of Mental Illness. Determining whether your client suffers from a mental disorder and, if so, the severity of the illness, is a complex process. A frequent and unfortunate assumption is that a difficult client is rude, suspicious, unhelpful or manipulative by choice. A client with a history of disagreeable, irrational or foolish behavior may be mentally ill or mentally retarded rather than simply bad company. Your client's behavior is a vital clue to his mental status. When objectively assessed, such behavior may, in fact, be found to be symptomatic of a mental disorder or deficits.[5]

Keep in mind that symptoms of mental illnesses wax and wane so that even severely psychotic patients can intermittently appear normal. Conversely, overt signs that a defendant is psychotic - people who are out of touch with reality - can be overlooked even by a trained professional performing a cursory mental status examination. How your client appears when you first meet him may have no bearing on his behavior at the time of an alleged offense. While the rules and regulations of jail are an aggravation to you, the institutional structure and regularity may actually be therapeutic for a mentally ill defendant, especially if his mental illness is exacerbated by alcohol or if he is regularly receiving appropriate medication for his mental illness.

All these variables mean that the defense team must meet with the client over time and under different conditions to get an accurate picture of his behavior and capabilities. It is most likely that your client and his family will reveal symptoms of mental illness to you only after you have built a trusting relationship them. Keep in mind that the client and his family may not have been previously exposed to mental health experts or the process of a mental health evaluation. Reassure them that the mental health experts are there to assist the defense. In addition to family members, any person who has had an ongoing relationship with the individual, can be a source of invaluable information about the characteristics and progression of your client's behavior and his state of mind at the time of the offense.

Look for Evidence of Mental Health Issues. A thorough inquiry into all the circumstances of your client's life is always the necessary first step in identifying mental health issues. The product of this inquiry, a social history, is an organized, written presentation that puts into context every event, person, institution and environment — often going back several generations — that has had an impact on the defendant. The social history presents a family's genetic history and vulnerabilities to mental illness as well as a description of family patterns of behavior. It is usually prepared by a specially trained investigator who is experienced in gathering documents and conducting interviews that form the basis of the psycho-social history.

Gather All Documents Related to Your Client and His Mental Condition. In all criminal cases, any document potentially bearing social history information about the client may be significant. That is why you need to get them all. It's like panning for gold — you gather all available material, then meticulously sift through it for the valuable parts. Important clues about your client may be found in records regarding birth and death, school, marriage, social services, military service, employment, and medical treatment, among others. This is especially true when the client or his family is known or suspected to suffer from mental illness. In our experience, it is common to find evidence of mental illness dating back several generations. The investigative net necessarily widens when interviews or documents reveal that earlier generations or members of the larger family have exhibited signs of mental disorder. Continue to expand the investigation exhaustively so long as you find family members who have documented mental health issues. Such records shed invaluable light on your client's mental health history and demonstrate that the mental condition was a significant factor in your client's life long before the offense that brought him into the criminal justice system.

Talk to Everyone Who Has Known the Client Over Time. Interviews are the other major tool, in addition to documents, used to compile an accurate social history. Keep in mind that most people consider mental handicaps shameful and may be reluctant to reveal any signs of mental trouble. Like the client, they may think they are being helpful by minimizing, normalizing or rationalizing signs of mental illness in the defendant and his family. In some instances, they may not be candid because they want to cover up their own misdeeds, *e.g.*, acts of physical or sexual abuse. These factors help us to understand and explain why many severely mentally handicapped defendants remain completely unidentified as such in the criminal justice system. Recognize that the tendency of a client's family and friends to minimize, normalize or deny

mental illness is a barrier to achieving a reliable social history. The necessity of overcoming this hurdle is the main reason you must carefully select a social history investigator who has the ability to probe these matters with sensitivity and respectful perseverance. It also makes it critical to interview people such as neighbors, ministers and teachers who are outside the client's intimate circle of family and friends, so you get a picture of the client's life that is both broad and richly detailed.

Take Another Look at Labels Attached to Your Client. "He's not crazy, he's just mean!" How often have you heard that assessment? Too often you've probably heard it from defense lawyers. A kinder but equally ineffective lawyer may conclude, "I talked to him, and he seems pretty bright to me" or "He's a drug addict, but I don't think he has any major mental illnesses." Learn to be skeptical of pejorative terms such as "sociopath," "cold," "manipulative" or "street smart" that normalize abnormal behavior. In our experience, our clients are good at hiding their mental illness. In fact, they often have years of experience "passing" as normal. Further, because of the stigma attached to mental illness, many mentally ill people find it less dangerous to be considered "bad" rather than "mad." Combinations of mental illnesses are common: mental health professionals refer to a "dual diagnosis" or "multiple diagnosis" to indicate a person who simultaneously suffers from more than one mental disorder.

Poor people with limited access to mental health treatment often use alcohol or drugs as a means of self-medication to treat disturbing symptoms of mental disease. However, it is important to remember that intoxication often occurs because of, and in conjunction with, other mental illnesses. We have represented such people. This type of defendant is likely to be inaccurately labeled as a drug addict with a disagreeable and mistrustful personality, rather than a paranoid schizophrenic who has tried to control intolerable auditory hallucinations with drugs and alcohol. Never assume that substance abuse rules out additional mental illness or mental retardation. They often co-exist.

Recently, as government programs have increasingly failed to provide needed residential care and treatment, we see the criminalization of the mentally ill. De-institutionalization and severe restrictions on community based programs have resulted in is a growing number of mentally ill criminal defendants, many of whom are charged with violent crimes. Even though properly treated mentally ill persons are no more violent than the general population, untreated or improperly medicated illnesses can contribute to tragic and avoidable offenses.[6] Consequently, the mental illnesses of many criminal defendants are often overlooked, making it imperative that you consider whether mental health issues are present in every defendant you represent. In many cases, they will be. Many mental illnesses have a gradual onset, making it even more important to acquire an accurate social history. Sometimes early warning signs can be identified as far back as elementary school. New research into paranoid schizophrenia, long thought to first appear in early adulthood, has identified subtle symptoms that were, in fact, present in children and adolescents.[7] Tragically, a number of these kids were labeled "behavior disordered" and considered *to be* a problem rather than *to have* a problem of mental illness.

Sexualized or aggressive behavior in your client's childhood history should always raise your suspicions. Clients who have suffered sexual abuse may have been described as "inappropriately knowledgeable about sex" or as "sexually forward." Children who were physically abused may have been called bullies themselves. Don't accept pejorative labels without looking deeper.

Secure Expert Assistance. Upon completion of a thorough social history, secure the services of a neuropsychologist to administer neuropsychological testing. This will help you understand how your client's brain is actually working (or failing to work). It will also help you determine whether the client has suffered injury to his brain and, if so, to assess the extent and effect of the damage.

Often it is difficult, if not impossible, for mental health experts to determine the cause of a mental handicap, even when there is damage to the brain. In the same way, it is difficult for an expert to pinpoint the cause of brain injury. However, it is widely accepted that damage to the brain can be the result of prenatal trauma, disease, exposure to neurotoxins, or head injury,[8] among other factors. Always search diligently for causal factors of brain damage. Remember that in the absence of severe head injury or an illness known to damage the central nervous system, an accumulation of small insults to the brain can result in serious neurological impairment and account for organic brain damage.[9] Medical diseases, such as diabetes or pancreatitis, can also have psychiatric consequences.

Consider Additional Expert Assistance. Next, consider whether you need to ask for expert assistance from a psychiatrist. The answer will very often be yes. Both neuropsychologists and psychiatrists are qualified to diagnose and treat mental disorders. However, the two professions do not otherwise overlap since only medical doctors, such as psychiatrists, are qualified to assess medical factors and prescribe medication. Conversely, only psychologists are qualified to administer psychological tests. If you suspect mental retardation, further psychological testing will be needed to ascertain the client's deficits in intellectual and social domains.

At this point, you may also able to determine if additional mental health experts, such as a neurologist (a medical doctor who can help to pinpoint the causes and the effects of brain damage), a psycho-pharmacologist (a psychologist, pharmacologist or medical doctor who specializes in the effects of chemical substances, and combinations of chemical substances, on human behavior), a developmental psychologist (a psychologist who specializes in the various stages of

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development humans go through from infancy to adulthood), or a clinical social worker (a licensed mental health professional who understands human development and social relationships), are needed to assist you in achieving a thorough and reliable mental health evaluation of your client. You will also be in a better position to demonstrate why you need funds to complete the evaluation.

Developing and Presenting a Comprehensive Defense

If the mental health evaluation confirms that your client is brain damaged or mentally retarded, the severity and characteristics of the condition will influence your strategy regarding how and where to present mental health evidence. However, in ALL mental health cases, it is critical that you utilize each and every motion, court appearance and meeting with the government to emphasize your client's condition.

Mental illness can affect all aspects of a person's feelings and behavior to the extent that almost all actions and decisions made by a mentally ill client are called into question. This means that every stage of a criminal case is loaded with mental state considerations. For instance, was the waiver of your client's rights knowing and intelligent? Was the confession voluntary and reliable? Was the defendant coerced to make a statement? Did the defendant have the specific intent to commit the offense? Was there an irresistible impulse? Are prior convictions — especially guilty pleas — valid or are there grounds to challenge admissibility? We could go on with examples, but you get the picture: Whenever any issue is affected by what might have been going on in your client's mind, mental health evidence is potentially relevant. Unless you present your client's mental illness as a major cause for the offense, it may appear to be nothing more than an excuse dragged out by the defendant to avoid punishment for the crime. Even worse, a poor presentation could result in your client's mental illness being perceived as a fabricated justification for a heinous offense.

Determine When and How to Raise Mental Health Issues

Make your theory **comprehensive** by applying it to each stage of the criminal proceedings. In order to provide an adequate defense and a cohesive presentation of mental health issues, every step in the proceedings against your client must be analyzed in light of the mental health issues in your case. Whether you enter a special plea of incompetency, put forward a mental retardation defense or plead Not Guilty by Reason of Insanity (NGRI) on behalf of the client will depend upon the severity of the mental condition and the time of onset. However, in all cases, your analysis of how mental health factors influenced your client should be wide ranging. Even if you believe as a rule of thumb that mental health issues are strategically unwise, your client will only benefit from your in-depth investigation and consideration of specific facts relating to his mental health.

Waiver of Rights and Consent. A voluntary waiver of rights must be made by a person who gives it knowingly and intelligently. Can a person who has auditory hallucinations be expected to comprehend *Miranda* warnings, much less understand the consequences of waiving a right? Is a person whose brain is damaged in the frontal lobe region and who is unable to monitor his impulses able to intelligently consent to having his room searched? Ask your experts to review the warnings given to the defendant and comment upon how his mental condition could impact his understanding of the warnings. Also determine how the symptoms of his mental illness would affect his judgment in an interrogation setting. In this context mental retardation is of particular significance, given the propensity of mentally retarded persons to agree with authority figures.[10]

Be sure to review any police notes and look for signs of mental or physical distress in the client before, during and after the waiver. If the interrogation or confession was taped, your experts should review it. Investigate whether the authorities knew about your client's mental condition - and whether they exploited it during their interaction with him-through the community grapevine, by personal interaction with him on the street, or from prior arrests and. Also determine whether your client was under the influence of drugs or alcohol — or mentally debilitated due to withdrawal from drugs or alcohol — at the time he waived his rights. Find out if medication was prescribed for your client and if he was taking it.

Competency. Competency, which is related to the client's fitness to stand trial, is usually determined prior to the trial on the merits. If you believe the client is unable to comprehend the nature of the proceedings against him or unable to assist you in his defense, competency is the first big issue to consider. Remember, competency has to do with the mental state of the defendant at the time of trial. It is an inchoate matter, in that a defendant who has been found incompetent may later become competent and stand trial. The reverse is also true: a client who has been found competent may later become incompetent, perhaps even during the trial. Many skilled attorneys fail to appreciate the difference between competency to stand trial (here and now) and criminal responsibility for the alleged offense (then and there).

Competency involves more than a superficial knowledge of the role of the courtroom actors. It requires that a defendant be able to understand and keep pace with courtroom proceedings, process and retain relevant information from witnesses, and be motivated to act in his own defense.

This article is too brief to provide a comprehensive discussion of competency but in our experience, attorneys avoid competency proceedings too often, even though the prospect of a competency trial can be a catalyst for a favorable outcome. The best example of this is the federal prosecution of Theodore Kaczynski, where vigorous, intelligent litigation of the defendant's competency to stand trial provided a framework where government mental health professionals agreed that Mr. Kaczynski was severely mentally ill. The compe-

tency litigation ultimately led to a plea. However, acknowledgment of mental illness in a high profile defendant by state doctors would never have happened if the defense had not set the stage with credible, comprehensive evidence of the defendant's long standing mental illness.

The constitutional standard of incompetence to stand trial is formidable and, as a rule, is very strictly applied by mental health professionals in state forensic hospitals. In some instances, it may be advisable to open a dialogue with the state doctors. You may want to provide evidence of prior mental disorders you have discovered in the social history investigation, especially if hospitalization or psychological testing was required. This is a difficult decision and should always be made after a full consideration of potential consequences, both positive and negative. If you do decide to communicate with state mental health experts, leave your aggressive courtroom tactics at the office and present your evidence in a collegial, supportive manner.

Failure to aggressively litigate questions of the defendant's competency results in far too many mentally ill and mentally retarded defendants facing trial when they are clearly unable to assist their attorneys. This is especially true of paranoid schizophrenics who may well understand the nature and sequence of a trial but, as a result of their illness, believe that their defense lawyers are determined to harm them and therefore withhold or distort evidence. This is an example of how an individual may appear competent on the surface when manifestations of his illness are, in fact, gravely undermining his defense.

In a situation where your client is unable to assist meaningfully in his defense, it is sometimes helpful to have your mental health experts observe your efforts to interact with your client so they have direct knowledge of the defendant's limitations in being able to assist in his defense as required by *Dusky v. United States*, 362 U.S. 402 (1960) and *Drope v. Missouri*, 420 U.S. 162 (1975).

Because mentally retarded persons are characteristically passive and suggestible, they often agree with authority figures and responding affirmatively when asked questions. It is easy to misinterpret passive compliance for cooperation and thereby overlook the fact that a mentally retarded defendant may have no understanding of the proceedings against him or that it is his role to assist his lawyers. It is especially critical to acquire the assistance of experts in identifying characteristics of mental deficits when you have — or think you may have — a mentally retarded client or a client with a compromised intellect.

Criminal Responsibility. While there are variables among jurisdictions, mental disorders that rise to the level of a defense are narrowly defined so that there are far too many instances when a profoundly mentally ill defendant may not meet the requisite criteria. However, most jurisdictions have some form of a diminished capacity verdict as an alternative to NGRI as well as lesser included offenses.

Since mental health evidence supporting a plea of NGRI or diminished capacity go to the state of mind of the defendant at the time of the crime, it is often advisable to give jurors the widest range of possible verdicts that reflect mental health issues. Also give them multiple opportunities to apply your client's mental health issues to their deliberations. This is especially true in a death penalty case because jurors are considering punishment from the outset of the trial process.[11] These types of more favorable verdicts often turn on the defendant's mental state (*e.g.*, absence of malice or no specific intent) so it does not necessarily follow that mental health issues that do not rise to the level of a defense should be reserved for sentencing considerations.

Not Guilty by Reason of Insanity. Insanity means either the defendant was too mentally disabled to form the requisite intent to commit a crime or the illness is manifested by a delusion so frightening that, if it were true, would justify the crime. A verdict of Not Guilty by Reason of Insanity exonerates the defendant from responsibility for the crime and results in mandatory confinement to a mental hospital. Because the definition of insanity is so narrow and the defendant has the burden of proof, attorneys often fail to plead NGRI, saying the success rate is virtually *nil*. Yet, how many of these same attorneys would decline to put up a credible alibi defense in a difficult factual case? In our experience, it is far more likely that mentally ill defendants forgo mental health defenses because their own attorneys, unfamiliar with the field and inexperienced in litigating these complex issues, inaccurately assess the severity and impact of the client's mental condition and fail to understand the link between the mental disability and the offense. This is not to say that NGRI should always be pursued. Certainly, there are many cases in which it may not be the most effective way to present mental illness. However, the possibility of litigating NGRI should not be disregarded out of hand simply due to the currently reigning theory that juries won't buy an insanity defense.

Guilty But Mentally Ill. While evidence of a defendant's mental illness may not result in a verdict of NGRI, in some jurisdictions the jury may compromise at a verdict of Guilty But Mentally Ill (GBMI). In a death penalty case, a verdict of GBMI would certainly indicate openness to mental health themes in sentencing. Doubtless, the defense is in a stronger position in the punishment phase of a capital trial if the jury has heard evidence that the defendant acted under the influence of mental illness rather than malice. Take care, though. Entering a plea of Guilty But Mentally Ill in a death penalty case should be approached with caution because it may render errors harmless, including issues of waiver and consent.

Developing and Presenting Consistent Mental Health Evidence

Mental Health Issues Must Be Integrated into All Phases and Pleadings in the Case

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We have seen countless cases where the defense proclaims innocence in the media, in the courtroom and before the jury and then switches to a mental health theory of mitigation during the sentencing phase. Such inconsistency undermines your credibility and diminishes the weight jurors will give to your mental health evidence.

Mental health evidence that comes as a surprise to jurors will be interpreted as a last ditch effort by the defendant to avoid the consequences of the crime. Therefore, every characterization you make of the case, whether in court, in negotiations with the state, in conversations with jail personnel, in public or to the media, should be consistent and shed light on the mental health aspects of your case. Above all, no facet of the presentation should allow a juror to think the defense considers mental health factors to be a justification for the offense.

Front Loading. To avoid sharp distinctions among the phases of litigation, present mental health evidence as early as possible. This method is sometimes called front loading. It allows you to influence the tone of the proceedings and acquaint the community, the court and the state with your theory of the case. Front loading is the cornerstone of a consistent presentation of your case.

When mentally ill defendants are indigent, acquiring necessary resources to provide an adequate defense requires energy and ingenuity. Take every opportunity to educate the court regarding the mental health issues in your case through well-crafted ex parte motions and arguments for funds for expert assistance. If the judge denies the funds, request evidentiary hearings on each expert and call witnesses to support your requests. Use all your skill and creativity to avoid the mis-characterization of your client as an evil individual rather than a severely mentally handicapped human being who deserves compassion.

An excellent example of front loading occurred in Susan Smith's trial when her history of sexual abuse, suicidality and depression was presented in the guilt/innocence phase to rebut the state's allegation of motive — that she had killed her children to improve her chances of marrying a wealthy bachelor. This approach clearly influenced the jury to unanimously reject the death penalty for Susan Smith.

Likewise, front loading evidence regarding mental retardation or brain damage also is usually helpful. This was illustrated by the comments of a man who had served on a capital jury in which a verdict of Guilty but Mentally Retarded was rejected in the guilt/innocence phase but presentation again in sentencing proved critical. In explaining why the jury reached a life verdict, the juror said, "We weren't sure he was mentally retarded, but we weren't sure he wasn't either." As for his own vote for life, he said, "I've heard all my life that mentally retarded people are God's angels and I was scared to take a chance I might be killing one."

Voir Dire. It is crucial that you explore attitudes toward mental disabilities during voir dire. Use the voir dire process to educate prospective jurors about the particular mental disabilities suffered by your client. Then, when impaneled jurors hear evidence from expert and lay witnesses, they already will have been exposed to the concepts and evidence you present and are far more likely to understand the significance of that evidence.

In a capital case, prospective jurors who are not willing to give meaningful consideration to your mental health mitigation evidence, even after the client has been convicted of a death- eligible murder, are not qualified to sit on the jury.[12] Attempt to prevent the court or the state from rehabilitating prospective jurors who will automatically reject mental health evidence during deliberation in either phase.

Opening Statement. An opening statement is your chance to display the 4 Cs. Never overstate the longevity, severity or effects of your client's mental condition or exaggerate the findings of mental health experts. Clearly and systematically lay out your theory of how the mental disability affected all aspects of the case — events leading up to the crime itself (including motive and intent to commit the crime), the investigation, arrest, interrogation of your client and even how your client appears in the courtroom. In cases of innocence, point out how mental health factors contributed to the accusations against your client. Remember that jurors in death penalty cases almost always think about punishment as they consider guilt/innocence issues so it's necessary to consistently provide a framework for jurors to consider the offense and punishment in the context of your client's mental condition.

Capital Sentencing Issues: Rebutting Aggravation. Whatever statutory aggravating circumstances the state puts forward, the state's goal is to keep the jurors' attention on the defendant's criminal behavior and to portray him as the vile, depraved, inhuman monster who committed that heinous crime. Mental health evidence is a way for you to assert your client's humanity through his frailties. When possible, recast motive and intent in each aggravating circumstance. In a recent capital trial, the defense acknowledged intent to commit armed robbery of an elderly man, an act described by the state as predatory. Even so, in the sentencing phase, the defense effectively demonstrated through testimony from mental health experts that the victim's unexpected aggressive response to the defendant's demand for money resulted in panic in the defendant. Family witnesses testified about repeated beatings of the client and his siblings by their father that were so severe they had felt their own lives were threatened. In this instance, the expert and lay witnesses, in combination with the defendant accepting responsibility for armed robbery, provided a credible explanation other than malice for a tragic death. As a result, the jury rejected the death penalty as fitting punishment.

Capital Sentencing Issues: Prior Convictions. When left

unrebutted or unexplained, a defendant's prior offenses serve as evidence that he is incorrigible and dangerous. Look for evidence that the same mental health factors that influenced the current charges were also at work in earlier offenses, and for correlations between periods of treatment and reduced criminal activity. Review the social history with a fine tooth comb for signs that the mental condition was present at the time of the earlier offenses. Then, have your mental health experts review records of the prior offenses for signs that mental disorders also influenced these offenses. In a case of mental retardation, look for evidence that your client has been repeatedly duped into committing crimes by smarter accomplices who manage to get away and let him take the blame.

Rebuttal of prior offenses must be consistent with your theory of the present case and treated with the same care as the current charges. It is absolutely necessary to have a comprehensive social history in order to identify recurring influences on your client's behavior. When you use mental health evidence to rebut prior offenses, the presentation must be credible, comprehensible and consistent in every way with your theory of defense in the current case. Otherwise, you not only fail to present an alternative perspective regarding prior convictions, you undermine the credibility of the current case as well.

Capital Sentencing Issues: Mitigation. Research on the factors that influence capital jurors in the sentencing phase repeatedly has found that mental health issues are extremely significant. When jurors are convinced that a defendant was acting under an extreme mental condition or emotional disturbance or has significant mental limitations, they are more inclined to grant mercy.[13]

During the sentencing phase, the stringent technical definition of NGRI is a thing of the past. Take advantage of the somewhat relaxed rules of evidence in sentencing, and put the jurors in the shoes of the defendant. Don't let your experts give dry, psychobabble testimony or rely on vague, overused phrases like "dysfunctional." Use the expert witnesses to compassionately portray to the jurors the turmoil inside your client's head.

Most people have no idea what it is like to experience auditory hallucinations and mistakenly believe they can be turned on or off like a radio. This was dramatically disproved in a workshop we recently attended where the participants, all lawyers, were given headphones with tapes simulating auditory hallucinations. While listening to the tapes, selected participants were asked to answer ordinary questions and perform simple tasks like drawing a map from home to a nearby restaurant. Invariably, these routine activities proved difficult under the influence of intrusive auditory commands. Consider using demonstrative evidence to illustrate your client's mental disorder, or refer to familiar characters in books, movies and television. Make the mental illness real to the jury so they can comprehend its devastating and disastrous effect on your client.

When mitigation evidence is developed and presented within a unified theory of the case, jurors not only are prepared to accept it, they actually will view the case differently. The 4 Cs are especially important in maintaining continuity between the phases of a capital trial. It is impossible to maintain credibility if you deny all allegations in the first phase, and then look to mental health issues to explain the crime and sway the jury toward a life sentence during the punishment phase. Anticipate potential contradictions — they must be resolved and incorporated into the unified theory of your case.

Closing Argument. In closing argument, weave all the strands of evidence together to form a compelling, comprehensible narrative that is a reasonable alternative to the prosecutor's proclamation that the client is evil to the core. You can only accomplish this if the mental health issues have been presented throughout the proceedings with time-consuming thoroughness, scrupulous integrity and righteous advocacy that place the tragic facts of the offense in the context of the severe and involuntary mental disorder of the defendant**.**

Developing and Presenting Comprehensible Evidence

When your witnesses testify, all of the 4Cs must be interlocked. Jurors must understand your evidence before they can accept your theory. They also must believe it. If they question the credibility of your evidence, they will likely stop listening and start resisting your theory. Without doubt, for your evidence to be understood **(comprehensible)** by jurors, it must have a reliable foundation **(credible)**, it must not come as a surprise **(comprehensive)** and it must not be used as an excuse only after all else has failed **(consistent)**.

Presenting Comprehensible Mental Health Evidence

Emphasize Lay Witnesses. Jurors tend to be skeptical of expert witnesses. As a general rule, they do not believe defense expert witnesses unless pre-existing information supports the expert's opinion.[14] Therefore, you must support expert findings through lay witnesses whose testimony traces the client's mental disability over time. In this way, the diagnosis of mental disorder is corroborated by reports of symptoms that existed before the offense and before the expert witnesses ever evaluated the client and reached a conclusion that he is mentally handicapped. Your strongest rebuttal to the state's claim that your client fabricated a mental handicap as an excuse for committing the offense is credible testimony by lay witnesses, especially if their testimony is backed up by contemporaneous documents. Jurors tend to identify with lay witnesses, whose testimony will resonate with the life experiences of the jurors. Remember, lay witnesses, expert witnesses and social history documents must be interlocked if you are to achieve a comprehensible presentation of mental health issues.

Explain Your Client's Mental Illness with a Teaching Witness. As a prelude to testimony by the expert witness(es) who evaluated your client, it is sometimes helpful to have a

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teaching witness describe to the jury the symptoms and behavior associated with a particular mental condition. This witness does not evaluate or testify about your client but does educate the jury and the court about your client's mental disorder by defining it, describing the symptoms and course of the illness, and explaining the pervasive force the disorder has on an individual's life.

Use Expert Witnesses to Show How Mental Illness Affected Your Client. The mixture of experts who evaluate and testify for the defense depends entirely upon the specifics of your case. You will need a neuro-psychologist to perform and testify about neuro-psychological testing and conclusions. You may need testimony regarding a psychiatric evaluation, particularly if your client has a history of hospitalization and medication for mental illness or, as is all too often the case, the client previously has been incorrectly diagnosed and improperly medicated. Obviously, if more than one expert testifies, all should be fully informed of each other's findings.

Mental health evaluations by psychiatrists and psychologists, especially in a forensic setting, tend to be tailored to answer narrow referral questions about the client's mental condition, such as whether the defendant is competent, insane or mentally retarded. As a result, expert testimony will be dry and technical unless you take steps to ensure the experts speak **to** the jurors in a conversational tone, rather than **at** them with academic arrogance. Make sure your expert witnesses are well versed in the details of your client's life and family history as well as his mental illness. That way, both expert and lay witness testimony will be consistent, comprehensible, credible and comprehensive.

Consider Additional Expert Witnesses. To paint a picture of your client's life with a broader brush, consider presenting testimony by a social worker with a master's degree (a person commonly called an M.S.W.) or doctorate who is qualified to assess the accumulated risk factors that contributed to his frailties.[15] After conducting a psycho-social assessment, a social worker can talk about the hazards an individual client faced at home and in the wider community. This perspective is particularly useful to a jury when a defendant's childhood was spent in a deprived environment where neither his family nor his environs had the resources to meet his basic needs such as food, shelter and stable, nurturing relationships over time. Such an analysis will anticipate and diminish an attack on your mental health evidence as nothing more than an "abuse excuse." A social worker will discuss how numerous psycho-social risk factors contributed to the client's conduct, exacerbated the ravages of mental problems and prevented meaningful intervention during his childhood when he was in dire need of treatment for his mental disabilities.

In death penalty cases, where the defendant's future dangerousness is always a consideration of the jury, whether statutory or not, an expert in prison adaptability can be very helpful in explaining that the structure of incarceration can control mentally handicapped inmates and, in fact, often leads to improvement of mental illness. This expert can also point out that inmates face the overwhelming mechanisms of behavior control available to corrections officers and can assure the jurors that in prison, taking prescribed medication is not voluntary and non-compliance with any prison regulation is not an option.

Be Sure Expert Witness Testimony Is Comprehensible. Jurors tend to be skeptical of expert witnesses in general and particularly skeptical of defense expert witnesses. Keep in mind that mental health experts are accustomed to talking to each other in the technical terms of their field. They have to be reminded that a diagnosis is professional shorthand for a cluster of symptoms that may be incomprehensible jargon to the average juror. To make sure jurors do not reject the testimony of your experts simply because they didn't understand it, help your mental health experts state their findings in plain, comprehensible language and common sense terms used by the average person.

Prepare Witnesses to Testify. Prepare the direct examination questions of every witness — lay or expert — with great care. Mental health cases can easily disintegrate into a series of disconnected, contradictory witnesses who testify in a disjointed manner in language that makes no sense to the jury. Every witness presenting mental health evidence must be thoroughly prepared by the defense team for direct examination and cross examination. Make sure your witnesses know your theory of the case and how their testimony supports it.

Demonstrate Compassion for Your Mentally Disabled Client

Making an effective presentation of mental health issues involves understanding and anticipating the effects of trial on your client. A person with a mental disorder does not perceive events or process ideas normally. The inability to process ideas and to communicate in a normal fashion is the very nature of mental disorder. When a mentally impaired person is enmeshed in the criminal justice system, his misperception of events around him and his communication disorders will only be exacerbated. This is especially true of the many mentally ill capital defendants who have paranoid tendencies and believe that you are part of a system that exists to cause them harm. However difficult it may be, remember that within the straightjacket of mental illness, this is logical.

You should expect that the defendant's symptoms and limitations will become increasingly apparent as trial approaches. This tendency, in combination with your own rising anxiety, can be explosive unless you prepare yourself and the client. In other words, if you think the client's accusations that you are doing nothing to protect his rights were irritating during pre-trial conferences at the jail, just wait until he hurls them at you in front of the jury and TV cameras.

By taking precautionary steps, you can limit the risk of your client acting out. For example, make sure that the client is receiving proper medication and that it is administered as directed. It is not unusual for the law enforcement officers who transfer your client from jail to court to forget to bring his medications, which are usually stored in a dispensary. If necessary, request the court to order that medication be provided and administered during the days when you are in court.

Continuously monitor your client's state of mind and take steps to reduce the stress he must endure. For example, in the case of a mentally retarded defendant who would characteristically become increasingly confused and frustrated during any proceeding, a motion to take a small portion of every hour to confer with the defendant and explain the proceedings to him is very helpful. Similarly, a mentally ill client may be able to withstand a six to eight hour day in court but beyond that, becomes unmanageable. A motion to end the proceedings every day at a certain hour might provide the relief and structure you client requires to control his impulsive behavior.

Returning to jail pandemonium at the end of the day is difficult for any client, but it can be especially agitating for a mentally handicapped one. It may be that assignment to an individual cell, where the client can retreat and calm himself, would be preferable. If he needs solitude, ask the jail custodians to make this arrangement in light of your client's mental state. Consult the client in all these decisions and respect his reasonable requests even though you may not be able to attain ideal trial circumstances. Keep track of his schedule and make sure he is allowed adequate time to sleep, eat, bathe and rest. Jails, especially those in large metropolitan areas, sometimes transport defendants hours before court is scheduled and make them wait hours after court before returning to the jail.

In short, do everything you can to reduce the stress your client experiences during trial. Every protective step you take helps avoid an outburst in open court. Such events are inevitably covered by the press and will be interpreted as signs of dangerousness rather than symptoms of mental illness. They almost always lead to increased courtroom security and overtly reinforce the picture of your client as unmanageable and threatening.

Anticipating and responding to the needs of a mentally impaired defendant is more than a behavior modification technique. It is a means of demonstrating to the client and everyone who has custody or control over him that you take his mental disorder seriously and intend to treat him with dignity and humanity. If you don't do it, how can you possibly expect that a jury will? Remember, you serve as a role model for the court, courtroom personnel, prosecution and jury, and, through your interaction with the client, teach others that your client deserves mercy.

Conclusion

Even though the fields of law and mental health share some mutual values and goals, the criminal justice system is not user-friendly for mentally impaired criminal defendants. Archaic definitions, burden-shifting, and cultural bias against mentally ill persons are only a few of the formidable challenges an attorney faces when defending a client with a mental disability. For mental health issues to be considered with fairness and mercy, evidence must be developed and presented in a consistent, comprehensive, credible and comprehensible manner. To shortchange any of these principles is to squander your client's compelling mental health issues. Worst of all, you are more likely to arouse anger and vengeance against the defendant rather than to foster the compassion and mercy you seek on his behalf.

Endnotes

1. John Blume, *Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination*, The Advocate, August 1995.
2. The web site for the National Alliance for the Mentally Ill is www.nami.org. The web site for National Institute of Mental Health is www.nimh.nih.gov.
3. American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994).
4. Benjamin J. Sadock & Virginia A. Sadock, eds. *Comprehensive Textbook of Psychiatry* (7th ed. 2000).
5. For an excellent article on this topic, *See* Deana Dorman Logan, *Learning to Observe Signs of Mental Impairment*, CACJ FORUM, v. 19, n.5-6 (1992).
6. H. J. Steadman, E. P. Mulvey, J. Monahan, et al. *Violence by People Discharged from Acute Inpatient Facilities and by Others in the Same Neighborhoods*. Archives of General Psychiatry 55:393-401, 1998.
7. *See* Michael Davidson, Abraham Reichenberg, et al. *Behavioral and Intellectual Markers of Schizophrenia in Apparently Healthy Male Adolescents.* American Journal of Psychiatry 156:9, September 1999.
8. If your client suffered head injury, or if you suspect head injury, consult the web site for Head Injury Hotline at www.headinjury.com.
9. For more information on head injuries, see the Head Injury Hotline web site at www.headinjury.com.
10. *See* Ronald Conley, Ruth Luckasson and George Bouthilet. The Criminal Justice System and Mental Retardation (1992).
11. William J. Bowers, Marla Sandys and Benjamin Steiner, *Foreclosing Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes and Premature Decision-Making*, 83 Cornell L. Rev. 1476 1998).
12. *See Morgan v. Illinois*, 504 U.S. 719 (1992).
13. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think*? 98 Colum. L. Rev.1538 (1998).
14. *See* Scott Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109 (1997).
15. *See* Arlene Bowers Andrews. *Social Work Expert Testimony Regarding Mitigation in Capital Sentencing Proceedings.* Social Work 36:5, September 1991. ■

DISTRICT COURT COLUMN

Discovery Motion Practice: What You Get, What You Might Get, and What You Owe

Part Two: What You Might Get

B. Scott West

Last issue's District Court Column began this three part series on discovery motion practice, and discussed those items to which a defendant is absolutely entitled when defending himself against the Commonwealth. Saying a defendant is "absolutely entitled" to something, is saying that he is entitled to it as a matter of right, simply by the asking. To be a "right," there must be a sanction when and if the right is violated. The rules and cases cited in last issue was intended to be a discussion of those items for which the Commonwealth would be sanctioned for non-compliance.

This issue continues with a discussion of what the defendant *might* get, depending upon whether his counsel can persuade the court that all prerequisites to getting the discovery have been satisfied. However, even when these prerequisites are met, the defendant is not vested with a "right" to get these documents or items. If the Commonwealth does not comply with the discovery rules governing what you *might* get, there is no valuable sanction unless counsel overcomes additional hurdles. The discovery you *might* get comes primarily from two rules of criminal procedure: RCr 7.24(2) and RCr 7.26.

This article also discusses "open file" discovery agreements, not specifically governed by any rule, and what happens when the Commonwealth does not comply with its discovery obligations under such agreements.

I. RCr 7.24(2): "Possession," "Materiality" and "Reasonableness"

RCr 7.24(2) provides in its entirety:

> On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in **the possession, custody or control of the Commonwealth**, upon a showing that the items sought may be **material** to the preparation of the defense and that the request is **reasonable**. This provision authorizes pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant). [Emphasis added.]

The phrase "books, papers, documents or tangible objects" is extremely broad; "documents" and "tangible objects" can be virtually anything. Also, there is no limitation that these books, papers, documents or tangible objects be something that the Commonwealth intends to introduce at trial – you may be able to get these things even if the Commonwealth has no intention of ever using them.

The limitations are that the request must be (1) for items in the possession, custody or control of the Commonwealth, (2) for items which are material to the preparation of a defense, and (3) reasonable.

A. "Possession, Custody and Control of the Commonwealth"

The requirement that the items sought must be in the possession, custody or control of the Commonwealth is a requirement contained in both sections (1) and (2) of RCr 7.24. This requirement was not discussed in Part One of this series. In this author's opinion, disagreements as to what constitutes "possession" or "control" by the Commonwealth more frequently arise when the defendant is seeking items under 7.24(2). Prosecutors frequently have the items listed in 7.24(1) (defendant's statements and lab reports) but if not, are generally agreeable to getting them because they help aid the prosecution of the case.

The problem arises when the defendant wants something potentially useful to the defense only. Then the "gee-I-don't-have-it-in-my-office" bit starts. Does this sound familiar: "You want social worker records? I don't have any, but don't worry, I'm not going to be calling any social workers at trial, or putting in any records, so you won't need them!"

Yes, you do need them, or you would not have asked for them in the first place. The question is whether they are in the "possession" of the Commonwealth even if they are not in the file. The answer lies in the case of *Eldred v. Commonwealth*, Ky., 906 S.W.2d 694 (1995).

In *Eldred*, the defendant was trying to get documents that were not in the actual possession of the Commonwealth, but were in the files of a state agency, the Cabinet for Human Resources. Noting that the Commonwealth was obligated to provide to the defense any discoverable document which is

in the "immediate, physical control" of the Commonwealth, the Court held that this would include any records "actually in the hands of the prosecutor, its investigator, and other agencies of the state." In so holding the Court has held that "Commonwealth" means the entire state and its agencies, not just the Commonwealth's Attorney office.

Frequently, the documents sought to be discovered are not in the hands of a state agency, but may be in the hands of the complaining witness. Is this in the possession of the Commonwealth? Arguably, yes. The Commonwealth – especially through the office of the victim's advocate – will be in a superior position to request the cooperation of the victim. Generally, if the complaining witness has evidence relevant to the case the prosecutor will hand it over. (For instance, suppose a criminal mischief case where a damaged item is alleged to be worth more than $500.00. Any documents relating to value of the item – invoices, tax returns which claim depreciation, written offers to purchase, etc. – would be relevant.) If the prosecutor does not hand them over, however, the *subpoena duces tecum* is always available to force the complaining witness to arrive at trial or a hearing and produce the documents.

B. "Material to the Defense"

Having established the item sought is in the possession, custody or control of the Commonwealth, the next issue to address is whether the item is "material to the defense." This is a different standard than "relevant to the case," and being able to articulate why your request meets the standard will get you an order allowing the discovery.

Black's Law Dictionary, Abridged 5th Ed., defines "material" as "important; more or less necessary; having influence or effect; going to the merits."

Prof. Robert G. Lawson in *The Kentucky Evidence Law Handbook, 3rd Ed.,* describes the difference between "material" and "relevant" this way:

> [I]t is not only in motion pictures that relevancy and materiality are subjected to misstatement and misunderstanding. No two words are more deeply imbedded in the vocabulary of lawyers and very few are so needlessly engulfed in confusion….
>
> **[R]elevancy involves the relationship between evidentiary and ultimate facts.** It is used most often, however, to describe the status of evidentiary facts – "the document is relevant," or "the testimony is irrelevant." Unfortunately, courts and lawyers occasionally substitute materiality for relevancy in describing the status of such facts, a misuse of language that accounts for most of the confusion that engulfs these terms. **Used most accurately, the term materiality involves the relationship between an ultimate fact (a proposition desired to be proved) and the claim or dispute under litigation; a material fact is one that is pertinent to the claim or dispute and an immaterial fact is one that is not.** [Emphasis added.]

To place into the context of a criminal case, "material to the defense" refers to defending against an issue important to the defense, which either will remove an element of a crime (which has to be proven by the Commonwealth), or will support of an element of a defense (which has to be placed into evidence by the Defendant and then disproven by the Commonwealth).

So what is an example of something that might be relevant but not material? Consider a situation where a client is found by the police in a wrecked car, drunk. After failing field sobriety tests, and blowing a .19 on the breathalyzer, he is charged with DUI, third offense, and driving on a DUI suspended license, first offense. The defendant admits he was drunk, but claims that he was not the driver of the vehicle, but that it was a friend of his who bolted before the police arrived on the scene. Defendant has always contended he was not the driver (the police even jotted it down on the uniform offense citation), and, miraculously, the friend is willing to come in and testify it was in fact he who was driving. (At least, *so far* he is willing to say that – wait until he finds out the prosecutor is going to charge him with leaving the scene of accident if he so testifies on the stand!) At every pre-trial, the defendant blurts out that he was not the driver.

Under these facts, what are the chances that the Judge is going to allow discovery of an operation manual for the Intoxilyzer 5000, or the repair records for the month immediately proceeding the test in this case? Slim. Even though the prosecution still has to prove both operation and BAC greater than or equal to .08 – thereby making the issue of whether the .19 BAC *relevant t*o an element which has to be proved by the prosecution – it is not really important to the defense, and therefore not *material*. Intoxication is no longer pertinent to the case given the admissions of the defendant and the posturing that has occurred on the lack of operation prong of the defense. Assuming the judge does not allow the discovery, and the client is convicted after presenting the "I was drunk, but I wasn't driving" defense, the Circuit Judge will not reverse for failure to give the discovery. The materiality of the evidence sought to be discovered has been undermined by events occurring in the case.

On the other hand, in a case where the BAC was exactly .08, and the *primary* defense contention is that the machine could not have been working properly because there is NO WAY the defendant had more than two beers in a four hour period, then the functioning of the machine and its recent rate of error is important, and therefore material. The dispute over whether the client was intoxicated has not been rendered unimportant by other issues in the case.

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Certainly there may be cases where both intoxication and operation are in dispute. In those cases, counsel should endeavor to get the operation manual. (Or actually, just call me, and I'll get you a copy of mine.) But where the posturing in a case has virtually removed an element as an issue in the case, the importance of the discovery on that point, and therefore its materiality is low.

C. "Reasonable"

"Reasonable" is a relative term that must be discussed in the context of the discovery item sought. A crowbar used in a second-degree assault is a tangible item that can be reasonably discovered if it lies in the evidence locker of the local police. It cannot be reasonably discovered if it is located at the bottom of Kentucky Lake after the defendant threw it there after striking the victim. When making a showing of "reasonableness" to the court, it is advisable to stay within certain parameters:

- Items which are *exclusively* within the possession, custody or control of the state (*e.g.*, documents contained within the files of the Cabinet for Families and Children, *see Eldred, supra*) are reasonable. Items which are *as easily obtainable by either* the defense or the Commonwealth are not reasonable. Recall Civil Rule 33.03, which provides that in a civil case, when the answer to an interrogatory can be derived from a business record, and the burden of deriving or ascertaining the answer from the records is substantially the same for the party serving the interrogatory, it is sufficient answer to direct the requesting party to the specific records which contain the answer. There is no reason why a judge of a criminal case would not employ a similar analysis in the event the discovery sought it as easily obtainable by one party as another. If the issue is cost of production, on motion, the judge can award the indigent defendant sufficient funds to obtain the discovery himself.

- Items which can be obtained by either party, *but more easily by the Commonwealth* than by the Defendant, is an opportunity to advocate that the Commonwealth should be taxed with that burden rather than the defense.

- It is reasonable to ask for items which are already in existence, and which are made in the ordinary course of business, or investigation. It is unreasonable to ask the Commonwealth to create items that do not already exist. For instance, a request for copies of photos taken of a crime scene is reasonable; however, it is unreasonable to ask the police to go back to the scene and take new photographs. (That comes under the do-it-yourself category!) For another example, a request for computer data already compiled, formatted, and printed in report form may be reasonable; but it may be unreasonable to ask the Commonwealth to take the data, compile it into a different format, and generate a new report. A judge may rule that it is reasonable to force the Commonwealth to give you the data in raw form; then you have to move for funds to have your own expert construct the reports you desire from the raw stream of data.

A. Maximizing Your Chances of Proving "Materiality" and "Reasonableness"

Be able to clearly and concisely demonstrate to the judge why your discovery request is material and reasonable. The more convoluted your rationale for needing something, the less likely the Court will grant the discovery. (Duh!) Plus, once you begin building a reputation for wanting the baseless, the useless, the needless, and the fruitless, you run the risk of being the boy who cried "wolf," and placing into jeopardy your chances of getting discovery some day when you really need it.

Ask for what you need; do not ask for what you neither need nor desire, just to make the Commonwealth work hard. The discovery process should not be abused in an attempt to overload the resources of the Commonwealth in the hopes that the prosecutor will actually *fail* to give you discovery, leaving you with an appeal point.

When possible, request 7.24(2) items that the *prosecutor actually intends to use* as evidence in a trial. It is more reasonable to ask only for those items which the prosecutor intends to put into evidence. It also increases the likelihood the prosecutor will give you the book, in order to leave open the choice of whether he will use it at trial.

Suppose while in the prosecutor's office you see on his shelf a medical book about the effect of prescription drugs on operating heavy machinery. You represent a person charged with a DUI while on a prescription for Lortabs, and would like to see what that book has to say on the subject. You do not know if the prosecutor is going to bring that book to trial or not. Certainly you can ask to see the book, and if the prosecutor objects, you can file a motion requesting to see it. Just be ready to explain why that book is material to your defense, and why you cannot purchase it yourself, or borrow it from a library. You might get it. But the judge might also say that you should procure your own copy, rather than get the Commonwealth's. "If you're fishing for information on Lortabs, you are going to have to do it yourself – I'm not going to make the Commonwealth do it for you."

Later, at trial, the prosecutor is allowed to use the book as a learned treatise. You object, because you were not allowed to see it. The judge says: "Overruled. You merely asked the Commonwealth for a copy of a book. I ruled that it was just as reasonable for you to get a copy as it was for the Commonwealth Attorney to provide you one, nothing more. Once you indicated that you might use the book yourself, of course the County Attorney was going to pull his off the shelf and look at it." The prosecutor gets away with one.

On the other hand, suppose in your discovery motion you ask generally for any books "which the prosecutor is going to use in trial." The prosecutor in now in a dilemma. If he fails to allow the defense attorney to look at it, he risks not being able to use it at trial at all. If the prosecutor had planned all along to use the book – or any other book – as a learned treatise, then you have now flushed him out. The judge will find materiality because you are no longer "fishing" for anything that may or may not help the defense – you are asking for evidence that will be used by the prosecutor against your client. It is reasonable, because it is already on the desk of the prosecutor, and he is going to have to give it to you *sometime*.

By asking for those items intended to be used at trial, you run the risk that a prosecutor will choose not to provide an item to you that you might otherwise have been able to persuade a judge to let you have. On the other hand, once at trial, you have foreclosed the prosecution from putting into evidence anything covered by your request that they did not provide to you.

B. Police Reports

RCr 7.24(2) specifically authorizes the discovery of official police reports, but not of memoranda, or other documents made by police officers. Note that the rule says "authorizes," not "mandates." Presumably, the rule still requires a showing of materiality and reasonableness, since "police reports" are included in subsection (2), not (1).

However, *Haynes v. Commonwealth*, Ky., 657 S.W.2d 948 (1983) holds that a police report which was prepared and signed by the investigating officer, and which "clearly related to the subject matter of his testimony" was discoverable. The case further held there was no generic work product exception that would limit its disclosure. Under *Haynes*, materiality and reasonableness are established when an official report clearly relates to the officer's testimony at trial.

So what are "official police reports?" They will vary from agency to agency. However, many Sheriff's departments model their forms after those used by the state police. According to the Kentucky State Police Policy and Procedure Manual, the following selected documents are routinely generated by the State Police as a matter of official police practice depending upon the nature and/or seriousness of the crime being investigated:

- **UOR-1** ("Uniform Offense Report – 1;" see Manual at OM-C-1): This is a case report required to be completed for (1) every felony case, (2) every misdemeanor case for which a citation will not suffice, and (3) in every instance where there is an allegation that a criminal offense has been committed against a victim's person or property. The UOR-1 must be submitted to the Records Branch, Uniform Crime Reporting Section of the State Police within 10 calendar days after the case is opened.

- **UOR-2** ("Uniform Offense Report – 2;" see Manual at OM-C-1): The UOR-2 is a supplement to the UOR-1. The manual says it should be filled out "if needed and appropriate." It serves as the narrative portion of any criminal case report and is attached to the UOR-1. The manual states that a UOR-2 is not necessary for cases below a C felony "unless one or more of the following solvability factors is present:"

  1. Identifiable witnesses, suspect or accused;
  2. Identifiable stolen property (*i.e.*, NCIC/LINK entry)'
  3. Value of stolen property is $1,000 or more; or
  4. Evidence of investigative value is present.

- **KSP-41** (Form for Listing Evidence and Recovered Property; see Manual at OM-B-18): Evidence or other items recovered during the investigation of a crime. Some items which are being sent to the forensics lab and **not** requiring a KSP-41 include: photographs, videos, blood sample kits, gunshot residue kits, rape kits and other biological fluids which may be consumed by the lab during testing. Read the policy for clarification on what does and does not have to submitted with a KSP-41.

- **KSP-74** ("Traffic Accident Report;" see Manual at OM-E-1): Used whenever there is a traffic accident, including hit-and-run accidents.

- **Accident Reconstruction Report** (See Manual at OM-E-6).

- **List of Authorized Checkpoints** (See Manual at OM-E-4): Whenever the state police use a traffic checkpoint (other than a roadblock, covered by a different policy), they must use a location specified on the Post's list of authorized checkpoints. Locations are pre-approved based upon factors such as safety, visibility to the public, and other factors which "justify" the location being placed on the list. Traffic checkpoints shall not be held at locations other than those on the list "except under extenuating circumstances." If the traffic checkpoint in your case is not on the list, be sure to request the "extenuating circumstances" in a motion for a bill of particulars.

I. RCr 7.26: Witness Statements and Reports

RCr 7.26 is captioned "Demands for production of statement and reports." However, the text of the rule does not mention the word "report" at all, and rather refers only to witness statements. Subsection (1) of the rule provides:

> **Except for good cause shown**, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its **possession which relates to the subject matter of the witness's testimony** and which (a) has been signed or initialed by the witness or (b) is or pur-

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> ports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant. [Emphasis added.]

The phrase "except for good cause shown" is confusing. As a defense attorney, I would interpret that phrase to mean that the prosecutor has an obligation – before the 48th hour prior to trial – to affirmatively show to the satisfaction of the Court good cause for why the Commonwealth should not be obligated to comply with the rule. Failure to do this prior to 48 hours of trial should result in waiver of any right the Commonwealth may have to not disclose the statements. Untimely producing a discoverable witness statement without an advance showing of good cause should automatically result in a sanction; a ruling that the statement is inadmissible, a dismissal of the case, a mistrial, or something.

A prosecutor would argue that "except for good cause shown" means that the prosecutor can be excused for failing to provide a statement in time upon a showing of good cause, even if the showing occurs after the time for production has lapsed. For instance, if during trial a police officer testified that a witness to be called in the case signed a written statement – to the surprise and chagrin of all counsel involved, including the prosecutor – the "good cause shown" phrase could be invoked, allowing the prosecutor an opportunity to explain the failure.

Which is the correct approach? The language and grammar of the rule seems to impose upon the prosecutor an obligation to make any good cause showings prior to the time when the statements are due to be disclosed. The location of the phrase – at the very beginning of the rule – implies that a showing of good cause is a prerequisite to not complying with the rule; cause must be shown before the obligation attaches. This interpretation is also consistent with part (2) of the rule, which requires an in camera showing and a ruling *in advance* of trial, whenever the Commonwealth contends that a statement does not relate to a witness's testimony. In any event, it would seem to be clear that the burden to show good cause, at some point, belongs to the Commonwealth.

Unfortunately, the case law does not support the defense view. The prosecution can show good cause at any time, even during trial. Moreover, even when the Commonwealth fails utterly to show good cause, no reversal will be granted unless the defendant meets its own burden of establishing prejudice. In *Gosser v. Commonwealth*, Ky., 31 S.W.3d 897 (2000), the Supreme Court addressed a situation where the Commonwealth introduced at trial diagrams which had not been disclosed within the 48 hour rule:

> The witness diagrams were not provided until the first day of trial. Their lae production violated RCr 7.26, which is commonly referred to as the "forty-eight hour rule"…
>
> The diagrams at issue fell within the scope of RCr 7.26. They were witness statements in documentary form that were in the possession of the Commonwealth. Further, they were related to the subject matter of the witness's testimony and were signed by the witnesses.

Sounds good so far, eh? But the Court continued….

> However, even if the forty-eight hour rule is violated, automatic reversal is not required….Some prejudice must be found, or the error, if any, is harmless. Gosser argues that the violation of the forty-eight hour rule, without demonstrating any prejudice from that violation, is sufficient for reversal. We disagree. Because Gosser has not shown that he was prejudiced by that violation, we will not disturb the trial court's decision.

As stunning as that holding may appear (given the language of the rule which seems to burden the Commonwealth with showing good cause for noncompliance with the rule), the Supreme Court was merely affirming what a long line of Court of Appeals cases had already stated. In *McRay v. Commonwealth*, Ky. App., 675 S.W.2d 397 (1984), the Court of Appeals had held that the failure of a trial court to require the Commonwealth to provide the defendant a report required by RCr 7.26 is reversible error only if the accused can establish prejudice. *See also Hicks v. Commonwealth*, Ky. App., 805 S.W.2d 144 (1990).

Thus, while the Commonwealth may have to show good cause for not complying with RCr 7.26, it is apparent that it is incumbent upon the defendant to build in reversible error. In effect, the Commonwealth has no burden at all! You will not win by simply shouting "King's X! Prosecutor forgot to show good cause before the trial started! I win!" If, after a judge may rule that the Commonwealth has failed to show good cause, the defendant *still* has to show prejudice for that error to be reversible, of what value is the Court's ruling? Zilch.

So how do you show prejudice? Have the clerk swear you in, and testify by avowal all the things you might have done differently had you been given the statement or report in a timely manner. Testify as to the different approaches you would have taken in voir dire, and opening statement. If trial has not started, talk about the investigation you would have done if given more time, the witnesses you might have subpoenaed, the experts you might have requested funds for, etc. If the substance of the statement makes you change your mind about whether you will or will not call the Defendant as a witness, tell it to the judge. DO SOMETHING, and do it on the record.

II. "Open file" Discovery – *Caveat Emptor*

Also known as the next best thing to "no discovery," open-file discovery is when the prosecutor agrees to give everything in the file to the defense attorney, including those things

which might not otherwise be discoverable. If it is in the file, the defense attorney gets it, period. No need to show prejudice, materiality, or reasonableness. The *quid* for the *quo* is that the defense attorney is not supposed to ask the prosecutor to produce anything beyond what is in the file.

Advantages of "open file" discovery are that the defense attorney gets to see everything in the file, including those things that are in the file that the attorney does not know to specifically ask for. Normally, the Commonwealth does not have to permit its records "to be examined promiscuously by the accused." *Silverburg v. Commonwealth*, Ky., 587 S.W.2d 241 (1981) "The Commonwealth is under no obligation to furnish a writing unless it contains exculpatory evidence…" *Id*. However, "[w]hen the state agrees to maintain such an 'open file' policy, thereby disclosing its evidence and theories to the defendant, it is obligated to adhere to that agreement." *Hicks, supra* at 149. Of course, the defendant still has to show prejudice if the state fails to live up to the agreement.

Open file agreements may be advantageous if defense counsel believes he already has in his possession the universe of documents, and asking the Commonwealth to specifically provide things will only serve to "wake up" the prosecutor and get him working on the case. For instance, if counsel already has medical reports pertinent to the victim's alleged injuries, and the prosecutor does not, filing a specific request which includes "all medical records" may cause the prosecutor to get the documents, which he might not otherwise get if he has agreed to "open file" discovery.

However, the disadvantages of open file discovery are enormous and swallow the advantages. The prosecutor may not have much in the file. Maybe the prosecutor is lazy, and little investigation has been done. Certainly, once the prosecutor has enough information to convict, he has little incentive to go find additional things to put in the file. Maybe the prosecutor is not as imaginative as you are, and does not check under all the stones you want to turn over.

Maybe the prosecutor is sinister, and knows not to put much in the file, because the defendant is going to look at it. My mother always cautioned me never to attribute to malevolence what is equally explainable by ignorance. But sometimes, documents have a way of inexplicably turning up in the file only *after* defense counsel has examined the file. This puts the defense counsel of having to continuously check the file to make sure nothing else has materialized. If you think the Commonwealth is playing games with you, and is intentionally leaving things out of the file to thwart full discovery, you had better have more than mere surmise when you make that accusation in court. In *Hicks*, the court said:

> While we do recognize that the record does contain a slight intimation that the Commonwealth, but its conduct in failing to timely produce the statement, was attempting to suppress or secret this evidence, such proof is not substantial or compelling. Appellant has not demonstrated prejudice caused by this failure to provide the statement before the direct examination of Edwards or specified how such a timely delivery of the evidence might have reasonably altered the verdict.

Consider the implications of this holding. RCr 7.24(1) contains a list of the items which the rule says the defendant gets upon request. The cases interpreting that rule hold that the Commonwealth risks a sanction – possibly dismissal of the case or a ruling that the evidence not provided is inadmissible – by not complying with the rule. Now, the defense counsel is surrendering the "right" to this discovery by entering into an "open file" agreement with the Commonwealth. Remember, in "open file" *everything* is covered by the agreement, not just the RCr 7.24(2) and 7.26 items. If the Commonwealth reneges on its "open file" obligation, the defendant now has the burden to show prejudice. This is NOT a burden he had under RCr 7.24(1). Counsel has exchanged an absolute right to discovery for the possibility of having to prove prejudice, all in the hopes that the prosecutor's file has more in it than with which the prosecutor would ordinarily be willing to part.

Open file, insert foot.

Next issue: This three-part series concludes with an examination of what the defendant owes and does not owe the Commonwealth in reciprocal discovery – and what to do when counsel slips up! ■

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PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Commonwealth v. Banks
2001 KY LEXIS 176
10/25/01
(Not Yet Final)

Two Lexington police officers were walking on a September night in a high crime area when they saw Banks walk towards them through the front yard of an apartment. A no-trespassing sign was posted in the yard. The officers did not recognize Banks, who put his hands in his pocket and began to walk away when he saw the officers, and then stopped. He "appeared startled." The officers saw a bulge in Banks' pocket, and asked him to remove his hands. A pat-down search of the bulge led to the officer's belief that he had paraphernalia in his pockets. The officer asked for consent to remove the item, and Banks' gave his consent. The officer removed a crack pipe, and incident to arrest removed rolling papers, a second crack pipe and two rocks of crack cocaine. Banks' motion to suppress was overruled by the trial court. After entering a conditional plea of guilty, Banks appealed. The Court of Appeals remanded for the entering of factual findings. A second conditional plea of guilty was entered after the trial court again denied the motion to suppress. Again the Court of Appeals granted relief to Banks, holding that the police had conducted an illegal *Terry* stop. The Supreme Court of Kentucky granted discretionary review, and reversed.

The Court issued a unanimous opinion written by Justice Graves reversing the Court of Appeals. The Court ruled that no seizure occurred when the officers approached Banks, nor did a seizure occur when the officers told Banks to take his hands out of his pocket. "If Appellee had not agreed to remove his hands from his pockets and the officer had ordered that Appellee remove his hands, there would have been a seizure."

Instead, the first time the Fourth Amendment and Section Ten were implicated occurred when the officer frisked Banks. At that point, the Court ruled there was a reasonable and articulable suspicion. The fact that Banks was in a high crime area, that he was also apparently trespassing, that he "appeared startled" upon the officers' approach, that he "attempted to turn and evade the officers by walking in the opposite direction" in combination constituted reasonable suspicion. Thereafter the "fact that Appellee took his hands out of his pockets and a bulge still remained in one pocket, gave rise to a reasonable belief that he may have been armed and dangerous." Accordingly, the frisk was legal.

The Court also held that the removal of the crack pipe was legal. The Court held that this seizure was legal on two theories, that the plain feel exception justified the seizure, and that Banks had given permission to the removal of the crack pipe.

Hause v. Commonwealth
2001 Ky. App. LEXIS 926
10/19/01
(Not Yet Final)

The Court of Appeals has issued an opinion on an increasingly important and commonplace area of the law, privacy and computers. In this case, a San Bernadino, California, detective was investigating the distribution of child pornography on the Internet. After entering a chat room, he began receiving e-mail messages from someone identified as Bh0810, accompanied by attachments of child pornography. The detective obtained a warrant to obtain subscriber information from AOL. The detective served the warrant on AOL at its headquarters in Virginia. AOL revealed that Bh0810 was the defendant in Lexington, Kentucky. The detective then contacted a local detective who in turn obtained a search warrant from a Fayette County district judge. The warrant was served and the defendant's computer, notes, papers, pictures, and other items were seized, including several images of child pornography. The defendant eventually entered a conditional plea partly based upon his failed challenges to the searches.

Judge Huddleston was joined by Judges Dyche and Emberton in affirming the decision of the trial court to deny the motion to suppress. While the defendant challenged the first warrant for failure to conform to Virginia law, the Court stalled on the threshold issue of standing. The Court held that the defendant had no reasonable expectation of privacy in the subscriber information maintained by AOL because the defendant had communicated the information to AOL's operators. "In summary, we hold that Hause had no legitimate expectation of privacy in the materials and information provided by AOL."

The defendant also challenged the search in Kentucky based upon the staleness doctrine. The Court used *United States v. Spikes*, 158 F.3d 913 (6th Cir. 1998). "'Instead of measuring staleness solely by counting the days on a calendar, courts must also concern themselves with the following variables: "the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), the place to be searched (mere criminal forum of convenience or secure operational base?)."'" Using these factors, the Court held that the Kentucky Court had not relied upon stale information in issuing the search warrant.

Finally, the Court rejected the defendant's claim that the search warrant in Kentucky was overbroad. "Here, the war-

rant described with particularity the place to be searched and the things to be seized. Hause's primary complaint is that the warrant was overbroad because it allowed the police to seize the hard drive on his computer…This warrant was not a General Warrant as was issued by the infamous Star Chamber of England. Under the totality of the circumstances, probable cause existed to search the hard drive of Hause's computer."

Northrop v. Trippett
265 F. 3d 372
4/25/01
(Rehearing *En Banc* Denied 11/1/01)

This could be an important case if it passes an *en banc* petition.. Here, an anonymous caller contacted the Detroit Police and told them that two black males, one described as wearing a green jeans outfit, were selling drugs at the bus station. Officers Jackson and Collins went to the bus station and saw two black males sitting talking, with one of them wearing green jeans. Northrop did not have on green jeans. As they approached, Northrop put a duffel bag under his seat, stood up, and attempted to walk past the officers, although he was prevented from doing so by Officer Collins. Northrop was asked for his identification, to empty his pockets, and whether he had any drugs on him. When he said he had marijuana in his socks, he was arrested. The officers then looked into the duffel bag and found a large amount of cocaine. Northrop had a bench trial, was convicted of possessing between 50 and 225 grams of cocaine, and received 8-20 years in prison. Northrop appealed and included as an issue the receipt of the ineffective assistance of counsel due to his attorney's failing to challenge the search and seizure that occurred here. The Michigan courts affirmed his conviction.

Northrop then filed a habeas petition, and without conducting an evidentiary hearing held that Northrop had been denied the effective assistance of counsel, and granted the writ. The district court held that the officers had conducted an invalid search incident to arrest. The State of Michigan appealed.

The Sixth Circuit affirmed the district court in a decision written by Judge Guin joined by Judge Clay. First, however, the Court held that the district court had erred in finding an illegal search incident to a lawful arrest. Had the defendant been properly seized, the Court had no problem with the search incident to his arrest for marijuana. However, the Court did have serious problems with the initial stopping of Northrop.

The Court first found that Northrop had been subjected to a stopping under *Terry v. Ohio*, 88 S.Ct. 1868; 20 L.Ed 2d 869; 392 U.S. 1 (1968). The Court next found that there had not been a reasonable and articulable suspicion sufficient to justify the stopping of Northrop. Relying upon *Florida v. J.L.*, 120 S.Ct. 1375; 146 L.Ed.2d 254; 529 U.S. 266 (2000), the Court stated "Jackson and Collins stopped Northrop based solely on a tip from an anonymous source. The officers knew nothing about the informant. And in giving the tip, the informant only told the police that two black males, one wearing a particular type of name brand clothing, were selling drugs in the Greyhound Bus Station. The tip did not further describe Northrop. Nor did the tip provide any predictive information to allow the officers to assess its reliability. Further, the officers did not observe any suspicious behavior that would have justified the stop independent of the tip. Accordingly, the officers did not have the reasonable suspicion necessary to stop Northrop under *Terry*. This leads us to decide whether this illegal seizure rendered the cocaine evidence inadmissible. We find that it does."

After making this finding, the Court then found that Northrop's trial attorney had been unreasonable in failing to file a suppression motion. "[I]t is difficult to imagine what tactical advantage, or cost, could justify Braverman's decision to let the stop go without challenge…A reasonable attorney would have tested Officers Collins and Jackson's stop." Significantly, the Court found that Northrop was denied his constitutional rights under the AEDPA, holding that the Michigan Court of Appeals had unreasonably applied clearly established federal law.

Judge Boggs wrote a strong dissenting opinion. According to Judge Boggs, the trial attorney had reasonably believed that a *Terry* stop had not occurred, and thus his failure to file a suppression motion had not been unreasonable under *Strickland*. "Whatever we may think about Mr. Braverman's overall legal acumen, he was certainly in the best position to assess Mr. Northrop's credibility when he described his encounter with the police. I cannot find gross legal incompetence in these circumstances, and I certainly do not believe it was unreasonable that the Michigan courts failed to find it."

United States v. Scott
260 F. 3d 512
7/24/01

The Sixth Circuit has issued a definitive opinion on the good faith exception to the exclusionary rule in a case of first impression. Here, an officer in Tennessee heard from an informant that a large amount of marijuana was growing on the defendant's land. The officer contacted Judge Austin, who told him where he could be reached to sign the warrant. Instead, the officer took the affidavit and warrant to a retired judge who had signed several other warrants for the officer. The retired judge signed the warrant, the warrant was executed, and 401 marijuana plants, grow lights, chemicals, and ultimately 15 firearms were found. After Scott's motion to suppress was denied in U.S. District Court, Scott appealed to the Sixth Circuit.

In a unanimous opinion by Judge Martin joined by Judges Norris and Quist, the Sixth Circuit reversed. The Court noted that there was no case law on the question of whether the good faith exception should apply in the situation of a retired judge signing a warrant. *State v. Nunez*, 634 A. 2d 1167 (R.I.

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1993) was the only case which had considered the situation, and it had relied upon state law to rule that suppression was required.

The Court held that *Leon v. United States*, 104 S.Ct. 3405; 82 L.Ed.2d 677; 468 U.S. 897 (1984) did not apply. "[W]e are confident that *Leon* did not contemplate a situation where a warrant is issued by a person lacking the requisite legal authority. *Leon* presupposed that the warrant was issued by a magistrate or judge clothed in the proper legal authority…*Leon* noted that it left 'untouched the probable-cause standard and the various requirements for a valid warrant.'…At the core of these various requirements is that the warrant be issued by a neutral and detached judicial officer…We therefore hold that when a warrant is signed by someone who lacks the legal authority necessary to issue search warrants, the warrant is void *ab initio*."

United States v. Campbell
261 F.3d 628
8/22/01

The Sixth Circuit addressed a number of issues related to exigent circumstances in this case. Here, the Louisville Jefferson County Metro Narcotics Unit was examining packages at Fed-Ex with a drug-sniffing dog. The dog alerted on a package, causing the police to obtain and execute a search warrant on the package. This revealed 1047 grams of methamphetamine.

The officer removed the methamphetamine from the package, repackaged it, and placed an electronic transmitting device that would activate upon opening, and again sent the package. They obtained an anticipatory search warrant for the address listed on the package. An undercover officer took the package to the address, B&B Printing in Louisville. The officers were prepared to enter the building when the package was opened, pursuant to their search warrant. Instead, Campbell took the package and left B&B Printing and went home, where he saw a police cruiser out in front of his house (unrelated to the case). He looked for a time at the cruiser, and then went into his garage and opened the package, activating the transmitting device. The officer then went into Campbell's house and garage without a warrant, arrested him, and seized numerous items including the package and additional methamphetamine. After his motion to suppress was denied, Campbell entered a conditional plea of guilty.

In a unanimous opinion by Judge Duggan and joined by Judges Siler and Gilman, the Sixth Circuit affirmed. The Court held that the trial court was correct in finding exigent circumstances present sufficient to dispense with the requirement of a search warrant prior to entering Campbell's house. The exigencies were the presence of the cruiser out in front of the house, and Campbell's decision to remove the package from B&B Printing, for which the police had a warrant, to his house. "Under these circumstances, it was objectively reasonable for the police to believe that evidence inside the dwelling would probably be destroyed by Campbell within the time necessary to obtain a search warrant."

Campbell contended that "by altering the package prior to the controlled delivery, the police officers in this case 'created' the exigent circumstances upon which they relied to justify their warrantless entry into Campbell's residence." The Court rejected this argument by relying upon the fact that the exigencies present were not created by the police—the cruiser's presence out in front of Campbell's house, and Campbell's decision to relocate the package prior to opening it. "The officers in this case played absolutely no role in Campbell's relocation of the package, the presence of the marked police car in front of Campbell's residence when he arrived there with the package, or the practical impossibility of obtaining a search warrant for Campbell's residence prior to the controlled delivery."

United States v. Bender
265 F.3d 464
9/14/01

A case similar to *Campbell*, but much simpler, is this one recently issued by the Sixth Circuit. Here, postal inspectors were monitoring increased drug trafficking between Florida and Nashville, Tennessee. A drug-sniffing dog alerted on a particular package. Postal inspectors obtained a search warrant to open the package, revealing 21.6 grams of cocaine. The inspectors took out the cocaine and installed a transmitter. After Ms. Bender called about the package several times, the package was delivered by postal inspectors. The inspectors were armed with a warrant. After the package was delivered and opened, the inspectors entered the house, searched it, and arrested Bender. Bender filed an unsuccessful motion to suppress, and received 120 months in prison following a jury trial.

The Court affirmed Bender's conviction, including the denial of the motion to suppress. The Court, in an opinion written by Judge Gilman and joined by Judges Clay and Wallace, held that there was probable cause to issue an anticipatory search warrant based upon the frequency of drug trafficking between Florida and Nashville, the dog alert on the package, and the finding of 21.6 grams of cocaine. Further, the court held that the manner in which the warrant was executed was not in violation of the Fourth Amendment. "[I]t is clear that as long as the postal inspectors and entry team executed the search warrant during the daytime, the prerequisite for the entry was simply the signing of the delivery receipt, acceptance of the parcel, and the taking of the parcel into the residence. Because these conditions were met, the warrant was properly executed…."

United States v. Saari
2001 U.S. App. LEXIS 24941
11/21/01

The police received a call that shots had been fired at the residence of Anne Saari, the defendant's ex-wife. The defen-

dant, Michael Saari, was under a protective order. The police went to her house and talked with her, learning that shots had not been fired, that the defendant had been standing in the window with what appeared to be a pistol, and that he was always armed.

Four officers went then to Michael Saari's house. Once there, the officers pulled their weapons and knocked on the defendant's second-floor apartment door. They announced "police." The defendant opened the door and was standing inside his apartment in the doorway; the police ordered him to come out, and he did so. He came out with his hands above his head. The officers asked if he was armed, Saari answered yes, and the officers took a pistol out of his waistband. The officers then entered Saari's apartment and seized evidence resulting in his being charged with thirteen counts of possession of firearms and ammunition after a protective order had been entered against him. Saari moved to suppress, and the trial court granted the motion. The Government appealed.

The Sixth Circuit affirmed the lower court in an opinion written by Judge Roberts and joined by Judges Boggs and Clay. The Court relied extensively upon *United States v. Morgan*, 743 F. 2d 1158 (6th Cir. 1984). The Court held that Saari had been arrested in his home without a warrant in violation of *Payton v. New York*, 100 S.Ct. 1371; 63 L.Ed.2d 639; 445 U.S. 573 (1980). While the arrest here was effected outside of the home, the Court called it a "constructive in-home arrest" due to Saari's having come out of the house responding to the orders of the police. The Court rejected the Government's contention that exigent circumstances justified the immediate arrest of Saari, saying that there was no evidence of an immediate threat, that the defendant would or could destroy evidence, or that he would flee the scene. "Without the threat of immediate danger that would have given rise to exigent circumstances, the officers' safety did not require them to summon Defendant out of his house at gun point before obtaining an arrest warrant." The Court also rejected the Government's argument that the officers did not arrest the defendant but merely intended to interview him. "[T]heir desire to interview Defendant did not justify ordering him out of his home at gunpoint or constitute an exigent circumstance that excused their warrantless entry into Defendant's apartment."

United States v. Johnson
267 F.3d 498
10/3/01

Lexington Police Detective Edward Hart was told by an informant that Johnson was selling crack cocaine at 163 Rand Ave. in Lexington. Hart filled out an affidavit, including a request for a no-knock search warrant. The reason for the no-knock warrant stated in the affidavit was that "the informant states that deals inside the house are usually done near the bathroom in case the police should come in the house. Also, it has been the experience of Narcotics detectives that most of the dealers from Detroit have been armed when apprehended. Within the past 48 hours the affiant made a controlled purchase of narcotics at 163 Rand Ave. through a confidential informant. This informant has made 9 prior controlled purchases and provided numerous pieces of information that has been independently corroborated." The warrant issued, it was executed, and evidence was seized. After the defendant's motion to suppress was denied, he entered into a conditional guilty plea.

Judge Norris wrote an opinion affirming the denial of the motion to suppress, joined by Judge Quist. The Court held that the warrant incorporated the affidavit and thus specifically requested the authority to effect a no-knock entry. The Court also held that the affidavit supported the issuance of a no-knock warrant. The Court stated that where, "the affidavit in support of the warrant application includes recent, reliable information that drug transactions are occurring in the bathroom 'in case the police should come in the house,' it is reasonable to infer that this precaution is taken to facilitate the destruction of evidence and thus a no-knock warrant is within the range of alternatives available to the issuing judge or magistrate."

Judge Boyce Martin penned a dissenting opinion. He stated that it was unclear whether the warrant was a no-knock warrant, saying that while the warrant incorporated the affidavit, that incorporating language is "standard on the general warrant form in Kentucky, and no case law suggests that it applies to any situation other than curing warrants that lack sufficient particularity. Absent some evidence in the record, I would not so readily conclude that the warrant authorized a no-knock entry." Judge Martin further dissented from the majority's holding that the affidavit supported the issuance of a no-knock warrant. "The facts of this case present no indication that Johnson or anyone else in the dwelling was armed, likely to use a weapon or become violent, or of any threat to officer safety…Instead, the affidavit requested a no-knock warrant on the grounds that the informant stated that the drug deals were usually done in the bathroom. This statement, from which we are asked to infer exigency based upon destruction of evidence, is constitutionally inadequate for several reasons. First, the affidavit never refers to any specific amount of drugs, or other information indicating that an easily disposable quantity was involved…A generic allegation that drug deals are usually done in the bathroom, suggesting only the possibility of destruction of an unspecified quantity of evidence, could be incorporated into nearly every application for a search warrant in drug cases, and the knock and announce requirement would be nothing more than a quaint anachronism."

United States v. Mick
263 F.3d 553
8/29/01
Rehearing *En Banc* Denied 11/13/01

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Mick was a bookie in Alliance, Ohio, taking bets on football, baseball, and basketball. In 1997, the FBI prepared an affidavit in support of a search warrant to search Mick's house, trailer, and safety deposit box. It included information from three sources. A magistrate judge issued a search warrant, the execution of which resulted in money and evidence being seized. After an unsuccessful motion to suppress, Mick was convicted by a jury on 72 counts and ordered to spend 57 months in prison. He appealed his conviction.

In an opinion written by Judge Gilman joined by Judges Duggan and Siler, the Sixth Circuit affirmed. The Court held that misstatements made in the affidavit were not deliberate, reckless, or material to the probable cause decision, and thus did not have to be suppressed under *Franks v. Delaware*, 98 S.Ct. 2674; 57 L.Ed.2d 667; 438 U.S. 154 (1978). The Court noted that the affidavit supported the issuance of the warrant irrespective of the misstatements in the affidavit. Overall, in this highly fact bound opinion, the Court held that there was enough evidence to support a finding of probable cause sufficient to issue the warrant.

SHORT VIEW . . .

1. From Will Hilyerd's review of the *News of the Weird* of 10/21/01" "In July, the New Jersey Supreme Court reversed the conviction of Andre Johnson on drug charges, calling the warrantless search of his apartment illegal; the police had broken in, citing an emergency exception to the warrant requirement solely on the basis that Johnson's street name, Earthquake, made it obvious that he is too violent to have to wait on a warrant." *News of the Weird* (.715); 10/21/01
2. *District of Columbia v. Mancouso*, 778 A.2d 270 (8/2/01). When the police fail to knock-and-announce when executing a search warrant, evidence found therein should be suppressed even though the residents are not in the house at the time but instead are nearby within earshot and eyeshot. The Court reiterated that residents maintain their privacy interest in their homes despite the existence of a search warrant, and further despite the fact that they are outside at the time of the warrant's execution.
3. *State v. Ravotto*, 777 A.2d 301 (NJ 7/26/01). Blood tests taken from a DUI suspect who had wrecked was inadmissible due to having been taken by force, according to the New Jersey Supreme Court. Here, the defendant had a wreck, but was not injured. The police ordered that he be taken to the hospital, and that the hospital take his blood for testing. At the hospital the defendant tried to punch a doctor who tried to take his blood pressure, at which point he was strapped to a table in order to take his blood. The defendant later testified that he was fighting due to his fear of needles. A breath test was never offered. The Court reviewed *Schmerber v. California*, 86 S.Ct. 1826; 16 L.Ed.2d 978; 384 U.S. 757 (1966), and held that here as opposed to *Schmerber* the defender actively resisted the taking of his blood.
4. *State v. Hammond*, 778 A.2d 108 (Conn. 8/21/01). Police officers received an anonymous tip that two men were selling drugs in front of a church. The church was located in a high crime area. The tip said both men were African-American, and that one wore a blue and red coat, and the other a blue and white coat. The officers went to the church and found two men fitting the description given by the anonymous tipster. The men began to walk away when the officers arrived; they turned away again when the officers pulled their car in front of the men. These facts were more similar to *Florida v. J.L.*, 120 S.Ct. 1325; 146 L.Ed.2d 254; 529 U.S. 266 (2000) than *Illinois v. Wardlow*, 120 S.Ct. 673; 145 L.Ed.2d 570; 528 U.S. 119 (2000), and thus did not arise to the level of reasonable and articulable suspicion sufficient to justify seizures of the men.
5. *Garza v. State*, 632 N.W.2d 633 (Minn. 8/16/01). Where a magistrate issues a no-knock warrant based upon boilerplate information in the affidavit, the good faith exception to the warrant requirement does not apply according to the Minnesota Supreme Court. Where the affidavit lacks sufficient particularity to justify abandoning the no-knock rule, there are insufficient exigencies to issue the no-knock warrant.
6. *Fontana v. Haskin*, 262 F.3d 871 (9th Cir. 8/22/01). The Fourth Amendment is the proper constitutional right to use when analyzing a claim of sexual harassment by the police following an arrest. Here, the allegation was that following an arrest for drunk driving, one police officer got in the back seat with the arrested woman and sexually harassed her on the trip to the police station, and thereafter. The 9th Circuit held that the Fourth Amendment rather than the Fourteenth Amendment is the appropriate vehicle for filing an action under 42 USC 1983.
7. *State v. Munn*, 2001 Tenn. LEXIS 630 (Tenn. 8/31/01). The police illegally listened in to a conversation between a defendant and his mother, even though the conversation took place in the interrogation room of a police station through hidden video cameras and microphones. The Tennessee Supreme Court focused on the issue of standing, and held that Munn had a reasonable expectation of privacy. "[W]hen viewed with the circumstances indicating that the officers both deceived and assured the defendant and his parents that they were free to talk in private, we conclude that the expectation of privacy was reasonable and justified."
8. *Megel v. Commonwealth*, 551 S.E.2d 638 (Va. 9/14/01). A home is not the same as a prison cell, and thus even though a person is on probation and is being monitored electronically, he continues to retain a reasonable expectation of privacy in his home. The Court rejected the state's analogy to *Hudson v. Palmer*, 104 S.Ct. 3194; 82

L.Ed.2d 393; 468 U.S. 517 (1984), which held that prison inmates have no reasonable expectation of privacy in their prison cells.

9. *Sparing v. Olympia Fields, Ill*, 266 F.3d 684 (7th Cir. 9/19/01). In this civil rights case, the Court held that the police may not enter through a screen door without a warrant in order to make an arrest of a person who had come to the door responding to the officer's knocking. The Court relied upon *Payton v. New York*, 100 S.Ct. 1371; 63 L.Ed.2d 639; 445 U.S. 573 (1980).
10. *Caldwell v. State*, 780 A.2d 1037 (Del. 9/13/01). While *Whren v. United States*, 116 S.Ct. 1769; 135 L.Ed.2d 89; 517 U.S. 806 (1996) allows a police officer to stop a car for a parking violation when the true reason is to investigate suspected drug dealing, it does not allow for the officer to detain the driver beyond the time needed to investigate the parking violation. Thus, the fact that the officer frisked the driver and his passenger, cuffed them, and made the wait for other officers to arrive led to suppression of the evidence obtained after a drug dog arrived and alerted to the car.
11. *Scott v. State*, 782 A.2d 862 (Md. 10/11/01). A so-called "knock-and-talk" whereby the police knock on a door and request consent to search for drugs is constitutional and does not require any level of suspicion whatsoever, according to the Maryland Court of Appeals. The Court also rejected the defendant's argument that the police should inform the occupants that they may decline consent. The Michigan Court of Appeals reached the same conclusion in *People v. Frohriep*, 2001 Mich. App. LEXIS 203 (10/12/01).
12. *United States v. Chavez-Valenzuela*, 268 F.3d 719 (9th Cir. 10/15/01). Nervousness, standing alone, is insufficient to constitute reasonable suspicion. Thus, detaining the defendant past the time needed to process his following too closely stop violated the Fourth Amendment. "Encounters with police officers are necessarily stressful for law-abiders and criminals alike. We therefore hold today that nervousness during a traffic stop…in the absence of other particularized, objective factors, does not support a reasonable suspicion of criminal activity, and does not justify an officer's continued detention of a suspect after he has satisfied the purpose of the stop."
13. *Preston v. State*, 2001 Md. App. LEXIS 165 (Md. Ct. Spec. App., 11/1/01). The delayed search of a car driven by a suspect in an armed robbery was illegal and resulted in a suppression of the gun used in the armed robbery. Here the defendant was arrested, and the car he was driving, belonging to his girlfriend's mother, was taken to a county garage, where it was searched 2-3 hours after the arrest. The Court declined to hold that this was a search incident to a lawful arrest, and thus reversed the trial court's order overruling the motion to suppress. ■

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The leaders who succeed best will be those who are best able to (1) set direction during turbulent times; (2) manage change while still providing exceptional customer service and quality; (3) attract resources and forge new alliances to accommodate new constituencies; (4) harness diversity on a global scale; (5) inspire a sense of optimism, enthusiasm and commitment among their followers; and (6) be a leader of leaders.

— Bennis & Nanus

KENTUCKY CASELAW REVIEW

Michael Barth v. Commonwealth and Peter Barth v. Commonwealth,
Ky., __ S.W.3d __ (10/25/01)

(Affirming in part and reversing and remanding in part)
(Petition for rehearing pending)

In May of 1988, two individuals entered the home of Randall Jackson in Nelson County, Kentucky, bound him, blindfolded him, tortured him, stole his money and other valuables, and drove off in his wife's Cadillac. Michael Barth was arrested for the crimes after the police discovered that he had sold pieces of Jackson's jewelry to a pawn shop and that his mother was in possession of some of the stolen jewelry. Upon his arrest, Michael confessed to the crimes, but refused to give the identity of his accomplice. Later, his younger brother, Peter ("P. J."), was arrested and arraigned in juvenile court. P. J. was subsequently transferred to Nelson Circuit Court to be tried as an adult. Following a joint trial by jury, both brothers were found guilty of first-degree burglary, first-degree robbery, second-degree assault, and criminal mischief. Each was sentenced to 23 years in prison.

Use of Non-testifying Codefendant's Confession Violated Confrontation Clause

On appeal, P. J. argued that his brother's confession was improperly admitted at trial and at the juvenile transfer proceeding in district court. The Supreme Court reversed and remanded P. J.'s case for a new trial, holding that the admission of Michael's confession during the jury trial violated the Confrontation Clause of the Sixth Amendment to the United States Constitution as interpreted in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct.1620, 20 L.Ed.2d 476 (1968) and *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998). Michael's confession was redacted to refer to his accomplice as "the other party." While Michael's confession did not directly implicate P. J. by name, it was facially inculpatory as to the unnamed "other party." The jury needed only to make a slight, intuitive leap to infer that P. J., the confessor's co-defendant, was the "other party" identified in the confession as the primary perpetrator of the crimes. In addition, the Court held that if either party desired a limiting instruction as to the use of the co-defendant's confession, the party must ask. The trial court had no duty to give the instruction *sua sponte*.

Use of Confession Permissible at Juvenile Transfer Hearing

Despite ruling that Michael's confession was inadmissible at trial because it was hearsay as to P. J., the Court held that the Commonwealth could use the confession in a juvenile transfer proceeding. "[A] transfer hearing is not a trial and less stringent evidentiary standards apply." The Court analogized the transfer hearing to a preliminary hearing, where hearsay evidence is admissible.

Challenge of Venireperson for Cause – Having to Hear a Defendant Testify to Determine if he is "Remorseful" is Distinguishable from Requiring him to Testify that he is Innocent

Michael and P. J. argued that they were denied a fair and impartial jury because the trial court failed to excuse a venireperson for cause who stated that he "would have to hear a defendant testify under oath before he would believe that a defendant was remorseful." The Court held that "the privilege against self-incrimination and the presumption of innocence protect an accused from having to prove his own innocence. It has nothing to do with having to prove his own remorse. [The venireperson] did not say that he would presume Appellants guilty unless they testified to their innocence. He stated that he would not attribute remorse to one who did not testify that he was remorseful. This in no way infringed upon the right of Appellants to a fair and impartial jury."

Conviction of First-Degree Robbery and Second-Degree Assault not Double Jeopardy; Evidence Sufficient for Assault Conviction

Michael and P. J. argued, based upon the instructions given, that their convictions of first-degree robbery and second-degree assault merged; thus, their convictions of both offenses violated the proscription against double jeopardy. The brothers asserted that the conduct that formed the basis of the assault (poking Jackson with a pistol) was the same as that which formed the basis for the robbery (threatening Jackson with a firearm). The Court applied the test articulated in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), which examines "whether each provision requires proof of an additional fact that the other does not," and found no double jeopardy violation. "Appellant's convictions of first-degree robbery required proof of a theft or attempted theft, an element not required for their convictions of second-degree assault; and Appellants' convictions of second-degree assault required proof of an injury, an element not required for their convictions of first-degree robbery. Thus, each offense required proof of an additional fact which the other did not."

The brothers also argued that, under the instructions given, the evidence did not prove that Jackson suffered an injury from being prodded with a pistol. However, the Court noted that "the issue is not whether the instruction conformed to the evidence introduced at trial, but whether the Common-

wealth presented sufficient evidence of second-degree assault to avoid a directed verdict of acquittal. The Court found sufficient evidence because "Jackson testified that he was dragged across the carpet, beaten over the back with what he believed to be wood sticks, and kicked in the head, had hot candle wax poured on his neck and ears, and was prodded with a pistol."

No Time Limits for Testimony by Avowal; Testimony regarding Jackson's Gambling Activities Properly Excluded

During the trial, the brothers sought to impeach Jackson's credibility by eliciting testimony from him that he was a "bookmaker." The trial court prevented this line of questioning in front of the jury, but permitted the testimony to be entered into the record by avowal. Appellants argued that the trial court ended the avowal testimony prematurely and that the avowal testimony should have been heard by the jury. The Court held that RCr 9.52 and KRE 103(a)(2) do not provide time limits for testimony by avowal. However, the Court noted that an avowal should focus solely on the issue. The Court found the defendants were not prejudiced by the trial court's termination of the avowal because it lasted several minutes and was focused on the issue. The Court also held that the trial court did not err by excluding the proffered testimony. The testimony pertained to Jackson's alleged "bookmaking." "Jackson's alleged gambling activities were not on trial; and [a] third party's alleged motive for instigating the brothers to commit crimes did not absolve the brothers of their guilt. The unnamed party was not on trial. Thus, the probative value of the evidence of 'bookmaking' was minimal as compared to its prejudicial effect." In addition, the trial court did not err in preventing counsel to cross-examine Jackson regarding alleged "bookmaking" activities because it would constitute impeachment by a particular act in contravention of long-standing Kentucky law. CR 43.07.

Wood Sticks Properly "Identified" and Admitted into Evidence

The brothers claimed that two wood sticks found on Jackson's floor near where he was beaten were inadmissible because the sticks were not properly "authenticated" as the weapons used to beat Jackson. The Court noted that the question of admissibility of the sticks is one of identification – not authentication (which applies to writings, voices, bodily fluids, etc.). Tangible evidence is admissible "if it was found at a time and a place furnishing reasonable ground to connect it in some way with the [incident]. The proof need not positively show the connection; but there must be proof rendering the inference reasonable or probable from its nearness in time and place or other circumstances." *Higgins v. Commonwealth*, 142 Ky. 647, 134 S.W. 1135, 1138 (1911). Here, Jackson found the sticks "at the scene of the crime and they matched the welts on his back." Therefore, there was sufficient identification to allow their admission into evidence.

Evidence of Appellant Brandishing a Gun Prior to the Robbery Admissible to Prove "Identity" of Gun and Appellant as Perpetrator

The Court held that evidence that Michael threatened P. J. with a gun prior to the robbery was admissible under KRE 404(b), over his objection. Testimony concerning the gun proved the identity of the gun used in the crime, and, by inference, Michael's identity as a perpetrator of the crime. Thus, the evidence satisfies a listed exception to the general prohibition in KRE 404(b).

In addition to the above issues, the Court also held that a statement by the prosecutor that if acquitted, a defendant might commit other crimes, is not prosecutorial misconduct and does not violate *Payne v. Commonwealth*, Ky., 623 S.W.2d 867 (1981) (wherein the Court held it impermissible to advise the jury of the consequences of returning a verdict of not guilty by reason of insanity). Finally, the Court held that there was no error in the trial court's failure to dismiss first-degree assault charges and theft charges before the indictment was read to the jury, as summary judgment does not exist in criminal cases.

Justices Johnstone and Stumbo, concurred in the opinion, but would hold that a trial court is required "as a predicate to admission" to give a limiting instruction when a non-testifying co-defendant's confession is admitted at trial.

***Commonwealth v. Durham*, Ky., __ S.W.3d __ (10/25/01) (Certifying the law)**

Interrogatories Permitted in Criminal Cases as Long as Accompanied by Verdict Forms Which Authorize Jury to Return General Verdict

Durham was accused of firing shots into an occupied trailer and injuring two of the seven persons inside. A grand jury returned an indictment against Durham charging him with two counts of first-degree assault and five counts of first-degree wanton endangerment. Durham entered a plea of not guilty and was tried by a jury. At the conclusion of the evidence and over the Commonwealth's objection, the trial court submitted the case to the jury upon written interrogatories that required the jury to make certain factual findings but did not require the jury to return a traditional verdict indicating whether it found the defendant guilty or not guilty. The first interrogatory read:

> Do you find from the evidence beyond a reasonable doubt that Albert Durham, Sr., at the time and place, and on the occasion, fired shots into the trailer of Gene Miller?
>
> ANSWER: Yes___ No____
>
> _____
>
> FOREPERSON
>
> If your answer was No, return to Courtroom.

Continued on page 42

Continued from page 41

The jury answered "No" and returned to the courtroom. The trial court subsequently entered a judgment of acquittal and dismissed the indictment with prejudice.

The Commonwealth requested certification of the law in the Supreme Court of Kentucky as to the following question: "Whether jury instructions in a criminal case, phrased in the form of so-called "interrogatories" satisfy long-standing requirements of Kentucky law."

The Commonwealth's position was that the law should be certified "as precluding use of special verdicts and interrogatories in criminal cases except in very narrow and particular circumstances."

After analyzing RCr 9.54(1) (basic principles governing jury instructions in criminal cases), CR 49.01 (special verdicts), CR 49.02 (general verdict accompanied by answer to interrogatories) and the origin and history of special verdicts, the Court rejected the Commonwealth's position. The Court found that the procedure described in CR 49.02, whereby fact-based interrogatories accompany a general verdict, is consistent with the Kentucky criminal rules – with the caveat that a trial court may not direct a verdict contrary to the jury's general verdict of not guilty. "We recognize that there are cases in which eliciting particularized information from the jury is necessary and permissible, and we thus believe that RCr 9.54(1) does not prohibit all uses of fact-based interrogatories in criminal jury instructions." However, the Court emphasized that because a jury in a criminal case has the right to return a general verdict, all jury instructions in criminal cases must provide a verdict form that permits the jury to return a general verdict of either guilty or not guilty. Accordingly, the Court certified the law as follows: trial courts may utilize fact-based interrogatories in their jury instructions if, and only if, those interrogatories are accompanied by verdict forms which authorize the jury to return a general verdict. The Court cautioned that unless directed otherwise by statute, court rule, or precedent, trial courts should utilize jury instructions which call for special verdicts only sparingly and upon careful consideration of the defendant's due process rights.

Justices Cooper, joined by Justice Graves, concurred in part and dissented in part. Justice Cooper found the use of interrogatories inconsistent with the Rules of Criminal Procedure. After acknowledging that the majority is correct to note that certain penal code provisions require special verdicts with respect to aggravating circumstances, obscenity, and sexual performance by minors, Justice Cooper would limit the use of interrogatories "only to those that are required by such [penal code] provisions or that are necessary to determine the type of penalty phase required upon conviction (*e.g.*, whether a conviction of kidnapping requires a penalty phase as described in KRS 532.055 or KRS 532.025).

Hayes v. Commonwealth, *Ky., __ S.W.3d __ (10/25/01)*
(Affirming)

Hayes was charged with first-degree rape, first-degree sodomy and second-degree persistent felony offender (PFO II) after a woman reported that he raped and sodomized her in his truck after the two shared some of Hayes' methamphetamine. After a jury trial, Hayes was convicted of first-degree sodomy and PFO II. He was sentenced to 20 years in prison.

Defendant must Testify to Argue Improper Impeachment by Prior Conviction

The Commonwealth provided notice before trial that it planned to introduce Hayes' three-year-old misdemeanor conviction of third-degree sexual assault as part of its case in chief. The Commonwealth argued that the conviction could come in as evidence proving absence of mistake under KRE 404(b). Hayes filed a motion in limine requesting that the prior conviction be excluded from evidence. The trial judge ruled that if Hayes took the stand and testified that the sexual intercourse was consensual, then the Commonwealth could use the evidence of the prior conviction to impeach Hayes on rebuttal. Hayes did not testify and the evidence of his prior conviction was never admitted into evidence. On appeal, Hayes argued that the trial court's ruling in limine was incorrect, and, that as a result of that error, he was effectively precluded from testifying. The Supreme Court held the error was not properly preserved for review. In order to argue improper impeachment by a prior conviction, the defendant **must** take the stand and testify (citing *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). Moreover, the defendant's testimony must be given in open court and not by avowal. The Court overruled *Mathews v. Commonwealth*, Ky., 997 S.W.2d 449 (1999) to the extent it holds otherwise.

Improper Comment by Prosecutor During Voir Dire - Not Entitled to Relief Because No Admonition or Other Curative Measure Requested

During voir dire the prosecutor told the potential jurors that Hayes only stipulated to having sexual intercourse with the woman after blood samples and DNA test results were returned that disclosed sexual contact. The Court held that Hayes was not entitled to appellate relief because defense counsel only asked that the Commonwealth not "continue with the question." Therefore, "[the defense attorney] received the relief requested and never asked for an admonition."

Sufficient Evidence of "Forcible Compulsion"

The Court found that there was more than sufficient evidence of the "forcible compulsion" element of sodomy to warrant submission to the jury. The woman's undisputed testimony included the following: 1) Hayes drove her to an unlit gravel road instead of to her car as she had asked; 2)

Hayes attacked her and continued to attack after she requested that he stop; 3) she honked the horn of the truck to signal for help; and 4) Hayes slammed her head against the steering wheel and told her to shut up.

Chief Justice Lambert, joined by Justice Stumbo, concurred in the opinion. However, since Hayes did not testify by avowal, they were of the opinion that the Court went further than necessary in overruling *Mathews*.

Anderson v. Commonwealth,
Ky., __ S.W.3d __ (09/27/01)

(Affirming in part and reversing in part)

Anderson was convicted of two counts of first-degree rape, four counts of first-degree sodomy, and one count of sexual abuse of his stepdaughter, C. S. B. The victim testified that Anderson began having sexual relations with her in 1992 when she was 10 years old. Anderson was sentenced to 20 years for each rape charge, 20 years for each count of sodomy and five years for the sexual abuse charge, all to run concurrently.

Court Abused Discretion in Failing to Grant a Continuance

Anderson argued that the trial court abused its discretion by not granting his request for a continuance because he had met all seven factors articulated in *Eldred v. Commonwealth*, Ky., 906 S.W.2d 694 (1994). Further, Anderson argued that the Commonwealth had failed to disclose exculpatory information in a timely manner, and, as a result, he did not have adequate time to examine the evidence before trial. The Supreme Court agreed. The Court noted that Anderson moved for a 60-day continuance, the same length of time found to be minimal in *Eldred*. In addition, the Court found that the already complex case was made more so because of the Commonwealth's suspect discovery practices and that Anderson clearly suffered prejudice from the trial court's denial.

Evidence of Victim's Past Sexual Experience Erroneously Excluded Under Rape Shield Law

Anderson argued that evidence showing that C. S. B. made a statement to a nurse that she had sex with another boy was erroneously excluded under the rape shield law. An examining physician testified at trial that C. S. B. had a "loose vaginal opening" and concluded that C. S. B. had previously been penetrated, leaving the jury to believe that it must have been Anderson that penetrated her. The defense tried to cross-examine C. S. B. regarding her statement to the nurse, but the Commonwealth objected, citing KRE 412, the rape shield law. The Supreme Court held that the trial court erred in excluding this evidence. "KRE 412 holds that evidence of a victim's past sexual experience is not admissible unless it is at issue whether the defendant is the source of the injury." "The victim is a child, likely to be chaste, and the Commonwealth introduced medical testimony that she had a 'loose vaginal opening caused by penetration.' Therefore, in order for the defendant to rebut the inference that he is the person who caused the 'loose vaginal opening,' he must be permitted to introduce testimony that C. S. B. made a statement to a nurse that she had sex with another boy."

Even though the Court reversed for a new trial, it was careful to note that the purpose of the rape shield law is to ensure that the victim does not become a party on trial through the admission of evidence that is neither material nor relevant to the charge. The Court stated as follows: "We stand by this sound principle, and by no means wish to expand the law to admit more evidence than necessary to allow a defendant a fair trial. The exception here is limited to the situation of this case."

Anderson also argued that the Commonwealth was improperly permitted to amend the indictment at the close of its case-in-chief. In addition, he argued that the trial court erroneously refused to grant a motion for a judgment notwithstanding the verdict, a motion for a new trial, and a motion for a new trial based on newly discovered evidence. The Court declined to reverse on these issues.

Justice Keller dissented, joined by Justices Graves and Wintersheimer. Justice Keller would have affirmed Anderson's convictions. In his view, the trial court did not err either in denying the continuance or by preventing the defense from questioning the child victim about her prior sexual history. With respect to the continuance, Keller characterized the majority's ruling as "Monday-morning quarterbacking" that flies in the face of the discretion usually granted to trial courts in such matters and that the ruling "appears to authorize a sixty-day 'freebie' continuance in any criminal case." With respect to the rape shield ruling, Keller stated that "[t]he practical effect of today's majority opinion is that **the protection of Kentucky's 'Rape Shield Law' is no longer available to young victims!"** ■

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6th Circuit Review

Emily Holt

Hinkle v. Randle
2001 U.S. App. LEXIS 21696 (6th Cir. 10/11/01)

Prosecutorial Misconduct During Closing Argument

Mr. Hinkle was charged in Ohio state court with 3 counts of rape stemming from allegations that he had sex with his 10-year-old niece. His niece had become pregnant and named Mr. Hinkle as the father. She had an abortion but fetal tissue was preserved for analysis. A jury hung on 2 counts of rape, but convicted Mr. Hinkle on the one count supported by scientific evidence, specifically a molecular biologist's testimony that analysis of DNA from the fetal tissue and Mr. Hinkle indicated it was a "reasonable scientific certainty" that Hinkle was the father.

Defense closing argument was essentially an attack on the DNA evidence. DNA was just in its infancy when Mr. Hinkle's trial occurred, and trial counsel said it was "guesswork."

The prosecutor's closing argument rebutted defense counsel's claims regarding DNA evidence. The prosecutor told the jury that the trial court would not have allowed the evidence to come in unless the technology was "firmly established as scientifically reliable and accurate." He compared DNA testing with polygraphs, stating that polygraph results were not admissible because "their reliability has never been scientifically established to the satisfaction of the courts." The prosecutor concluded his argument by stating, "You have to first establish a history of scientific reliability and accuracy before you can ever use those things in court. And Mr. Collins [defense counsel] full well knows that's the case, and he knows that there is an established history of scientific reliability and accuracy of DNA." [The full text of both defense counsel's and the prosecutor's closing arguments are included in the Court's opinion.] Defense counsel failed to object to the prosecutor's closing argument. This failure to object ultimately foreclosed federal habeas review of the prosecutorial misconduct claim.

Failure to Object Bars Federal Habeas Review Unless Showing of Cause and Prejudice

The 6th Circuit first notes that Ohio's contemporaneous objection rule [like our own rule in Kentucky] is an adequate and independent state ground barring federal habeas review absent a showing of cause and prejudice. *Scott v. Mitchell*, 209 F.3d 854, 867-868 (6th Cir. 2000). Furthermore, a state appellate court's review for plain error is the enforcement of procedural default. *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000). The 6th Circuit looks to the last reasoned opinion of the state courts to determine whether those courts relied on a procedural rule to bar review of a claim instead of rejecting the claim on its merits. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). In the case at bar the Ohio Court of Appeals enforced the contemporaneous objection rule. Thus, Mr. Hinkle has "waived the right to federal habeas review unless the prisoner can demonstrate cause for noncompliance and actual prejudice arising from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice." *Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000).

For Attorney Error to Serve as "Cause," *Strickland* Must Be Met

Attorney error is not cause for procedural default unless trial counsel's performance was constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). In the case at bar, "[t]o show prejudice under *Strickland*, Petitioner must establish that but for the alleged error of his trial counsel in not objecting to the prosecutor's rebuttal argument, assuming that the prosecutor committed misconduct in making the challenged remarks to the jury, there is a reasonable probability that the result of the proceeding would have been different. Petitioner cannot meet this exacting standard. . . Here, defense counsel failed to lodge a contemporaneous objection to the prosecutor's characterization of the law regarding the admissibility of evidence that would have been before the jury irrespective of whether defense counsel had made that objection. . . While the prosecutor's remarks had the effect of bolstering the reliability of DNA evidence in general, they came in response to defense counsel's invitation to comment on the state of the accuracy and reliability of DNA evidence." Mr. Hinkle cannot overcome the procedural bar precluding federal habeas review of his prosecutorial misconduct claim. Furthermore, there has not been a fundamental miscarriage of justice. The 6th Circuit reverses the district court's grant of writ of habeas corpus.

Manning v. Huffman
2001 U.S. App. LEXIS 22509 (6th Cir. 10/19/01)

Trial Court "Experiment" in Allowing Alternate Jurors to Deliberate Requires Reversal

In Ohio state court, Mr. Manning was convicted of aggravated robbery with a firearm specification and of receiving stolen property. At trial, prior to closing arguments, the judge stated he was going to "try something unique in trial." He

was going to allow the 2 alternate jurors to participate in deliberations. They would replace regular jurors if any of them had to be excused before the verdict was returned. The prosecutor said on the record that he felt there was no legal authority for this "experiment," but that he would agree to it *if the defendant personally agreed.* While defense counsel agreed to the plan, and said Manning agreed, the record does not reflect Manning knew of his rights or personally consented to the plan.

When the jury retired to deliberate, the judge specifically told the alternates to "take part in the discussions and deliberations." Neither of the alternate jurors actually replaced a juror, but "it is undisputed that one of the alternate jurors actively participated in the deliberations."

Although Trial Counsel Did Not Object, Claim Can Be Reviewed Because State Courts Considered Merits of Claim

On federal habeas review, Mr. Manning asserted that trial counsel's failure to object to the plan to include alternates in deliberations violated his right to effective assistance of counsel. The state argued that this claim was procedurally defaulted when he failed to raise it on direct appeal. The district court, applying *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), held Manning had procedurally defaulted his claim and that the fact that an alternate juror participated in deliberations was not sufficient to demonstrate prejudice.

The 6th Circuit disagrees, noting that although Manning waived his right to bring a claim for ineffective assistance of trial counsel when he failed to assert it on direct appeal, the state courts did not enforce the procedural rule. Instead, the Ohio Court of Appeals reopened his case to consider his claim of ineffective assistance of appellate counsel and considered the merits of his claim, holding that trial counsel's failure to object did not prejudice Manning.

Actual Participation of Alternate in Deliberations: Prejudice Presumed

As to the consideration of whether the trial court's action in allowing the alternates to deliberate was prejudicial to Manning, the Court of Appeals first turns to *U.S. v. Olano*, 507 U.S. 725 (1993). In that case alternate jurors observed the jury's deliberations. The Supreme Court held "mere presence" of alternates did not demonstrate prejudice, but went on to say "the presence of alternate jurors might prejudice a defendant in two different ways: either because alternates actually participated in the deliberations, verbally or through body language; or because the alternates presence exerted a 'chilling' effect on the regular jurors." *Id.*, 739. The 6th Circuit ultimately holds that "in some situations a presumption of prejudice is appropriate," including when there is evidence of actual participation of jurors. The federal district court denied his petition for writ of habeas corpus but granted a certificate of appealability. The 6th Circuit reverses.

Valentine v. Francis
2001 U.S. App. LEXIS 24057 (6th Cir. 11/8/01)

***Austin v. Mitchell* Re-Affirmed: For Post-Conviction Petition to Toll AEDPA Statute of Limitations, Claims Must be Raised on Federal Habeas Review**

Valentine was convicted of murder in Ohio state court. He filed a timely notice of appeal, but his appellate counsel never filed a brief. After the time for filing a brief expired, he filed a motion for extension of time. The Ohio Court of Appeals dismissed his appeal because of failure to timely file a brief on August 11, 1988.

In September 1996, Valentine filed a *pro se* petition for post-conviction relief alleging ineffective assistance of counsel. On January 27, 1997, the trial court dismissed the petition as meritless and Valentine never appealed.

On March 4, 1997, Valentine, through a public defender, filed an application to reopen his direct appeal in the Ohio Court of Appeals. He alleged prior appellate counsel's ineffectiveness for never filing a brief. On May 15, 1997, the court denied the application on the ground that no good reason had been shown for the substantial delay in seeking the reopening of his direct appeal. Valentine appealed to the Ohio Supreme Court, which affirmed the Court of Appeals' actions.

On March 11, 1998, Valentine filed a petition for writ of habeas corpus. The district court dismissed the petition as time-barred by the one-year statute of limitations. The district court issued a certificate of appealability.

Because Valentine's conviction became final prior to the adoption of AEDPA, the one-year statute of limitations began to run on April 24, 1996. On September 11, 1996, Valentine filed his petition for post-conviction relief with the trial court, which was denied on January 27, 1997. However none of the claims in the post-conviction petition were alleged in his habeas petition. Thus, pursuant to *Austin v. Mitchell*, 200 F.3d 391, 393 (6th Cir. 1999), Valentine's post-conviction petition did not toll the statute of limitations because none of his habeas claims were raised in the petition. Valentine asks the Court of Appeals to hold that *Austin* was incorrectly decided and the filing of the post-conviction petition tolled the statute of limitations. The Court declines to do so pursuant to 6th Cir. R. 206(c) which states "reported panel opinions are binding on subsequent panels. . . Court en banc consideration is required to overrule a published opinion of the court."

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Bailey v. Mitchell
2001 U.S. App. LEXIS 24339 (6th Cir. 11/13/01)

Confrontation Clause Claim Waived When Defendant Agreed to Use of Deposition at Trial Without a Showing of "Unavailability" of Witness

Bailey was charged with 3 counts of robbery in Ohio. On the scheduled trial date, June 24, 1996, he requested a continuance so he could hire an investigator to locate some defense witnesses. The state had brought in 2 witnesses from Arizona to testify so it moved to depose them for purposes of trial. Defense counsel said nothing in response to this motion, and the trial court granted the motion. Bailey and defense counsel were present at the depositions, which were videotaped, and counsel cross-examined the witnesses. No objection was ever made to the taking of depositions in lieu of live witness testimony. The "petitioner's agreement that the deposition might be taken and used was a '*quid pro quo*' for the continuance."

Bailey had new counsel when the case finally came to trial. He never objected to the state's failure to prove the witnesses were unavailable. Instead, counsel moved to exclude the depositions because different counsel was present at the depositions and present counsel did not have the opportunity to cross-examine the witnesses. The trial court overruled this motion, the depositions were used at trial, and the jury found Bailey guilty of all 3 counts of robbery. The Ohio state courts affirmed Bailey's convictions. The federal district court reviewing the claim on habeas review also affirmed his conviction. On federal review, Bailey specifically attacks the use of the deposition without a showing of unavailability.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the U.S. Supreme Court held no violation of the confrontation clause occurred when the prosecution introduced the testimony of a witness absent at trial, but who had been examined and cross-examined at a preliminary hearing. The witnesses' whereabouts was unknown and the prosecution had attempts to locate and subpoena her. The Court held "the confrontation clause normally requires a showing that [an absent witness] is unavailable." *Id.*, 448 U.S. at 66.

Different Counsel at Trial Irrelevant

However, in the case at bar, there was a *quid pro quo* exchange in which Bailey received a continuance and the state was able to use video-taped depositions in lieu of live witness testimony. Bailey effectively waived any confrontation clause claim when he agreed to the arrangement. The Court of Appeals specifically finds that the fact that Bailey had new counsel at trial makes no difference. A stipulation occurred and is binding despite the presence of new counsel. "[S]tipulations save the taxpayers a great deal of expense. If the rule advocated by petitioner were adopted no such stipulations would be binding, and therefore, would not be made, to the great detriment of sound judicial administration."

Bulls v. Jones
2001 U.S. App. LEXIS 24802 (6th Cir. 11/19/01)

Admission of Statements by Non-Testifying Co-Defendant

This is a strong case for criminal defendants in the area of use of co-defendant confessions. Bulls was convicted in Michigan state court of first-degree felony murder, assault with intent to rob while armed, and possession of a firearm during the commission of a felony. His petition for writ of habeas corpus was granted by the district court on the ground that state courts erred when they held the admission as evidence of statements by his non-testifying co-defendant, while a violation of the confrontation clause, was harmless error. The Court of Appeals affirms the grant of the writ of habeas corpus.

Bulls, Terrance Hill, and Deonte Matthews participated in the armed robbery of the home of Jermaine Johnson in 1995. Mr. Johnson was shot and killed by Matthews, who was never brought to trial. Bulls and Hill were tried together. Neither Bulls nor Hill testified. Police Sergeant Warren testified as to statements made by Hill and Bulls while they were in police custody. He also read into evidence their formal statements to police. According to Warren, Bulls admitted to proposing the robbery and said he suggested to Matthews that he bring his gun. Bulls said Hill remained outside the home as a lookout. Bulls said he was upstairs searching a bedroom when he heard footsteps followed by a gunshot and that Matthews told him he shot Johnson because he tried to flee. Warren testified that Bulls never expressed intent to shoot or kill Johnson.

Warren also testified as to statements made by Hill that incriminated Bulls. Hill said that on the way to the scene, Bulls said "everything was going to be okay as long as he [Matthews] doesn't kill him." Hill said Bulls told him it would be easier to rob Johnson with Matthews' gun. Hill told Warren he walked away from the Johnson residence as soon as Bulls and Matthews went inside the house and he was not present when anyone was shot. Although Bulls objected to the admission of these statements by his non-testifying co-defendant as a violation of the confrontation clause, the trial court allowed the statements into evidence as statements against penal interest. Bulls was convicted and received a sentence of LWOP.

Accomplice Confessions "Presumptively Unreliable"— Must Prove "Indicia of Reliability"

The Court of Appeals begins its analysis by noting that it is undisputed that the admission of Hill's statements violated the confrontation clause. The Supreme Court has "spoken

with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." *Lee v. Illinois*, 476 U.S. 530, 541 (1986). "To overcome this presumption of unreliability and introduce such statements into evidence, the prosecution much show that the statements bear 'adequate indicia of reliability.'" *quoting Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The Michigan appellate courts found that a confrontation clause violation occurred in this case because the statements by Hill lacked an indicia of reliability as they were self-serving, shifted the blame to others, and were the product of custodial interrogation and the attempt to get a plea offer. Thus, the Michigan courts reasonably applied clearly established federal law in determining that Bulls' confrontation clause rights were violated by the admission of Hill's self-serving statements.

Error Not Harmless Where Statement is Only Evidence of Malice, an Element of Felony Murder

This is not the end of the inquiry however. The Court of Appeals ultimately concludes that the Michigan courts' determination that the error was harmless was an unreasonable application of clearly established federal law. Bulls has proven that the "confrontation clause error had a substantial and injurious effect or influence in determining the jury's verdict." In Michigan, the mental state for felony murder is malice, which is proven by proof of intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm is a probable result. It is undisputed "that there was a paucity of evidence establishing that Bulls possessed either the intent to kill or do great bodily harm." The mental state would have to be proven by evidence that Bulls intended to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm is a probable result. This evidence only came from Hill's statement, specifically his statement that Bulls said prior to the robbery that everything would be fine as long as Matthews did not kill Johnson.

Co-Defendant Statement is "Direct Evidence" vs. Defendant's Own Statement Which Only Establishes "Inferential Incrimination"

The Court of Appeals rejects Michigan's assertion Bulls' own confession established the element of malice. Instead the Court holds "Bulls' own confession only established facts from which the jury *could infer* that Bulls acted with malice. . . . with the admission of Hill's statement, the jury no longer needed to engage in any inferences at all. Hill's statement provided direct evidence that Bulls knew that there was a high likelihood that Matthews would kill Johnson, and thus that he 'knowingly create[d] a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.'. . . the Supreme Court has recognized that confessions that 'expressly implicate' a defendant are 'powerfully incriminating.' *Richardson v. Marsh*, 481 U.S. 200, 208 (1987). As opposed to evidence that is incriminating only when the jury makes an inference or when linked with other evidence, direct evidence is 'more vivid than inferential incrimination, and hence more difficult to thrust out of mind.' *Id.* In this case, Hill's statement obviated the need for the jury to infer anything, and directly supplied evidence of the disputed element of malice. We must conclude that this admission had a substantial and injurious influence in determining the jury's verdict."

Miller v. Francis
2001 U.S. App. LEXIS 21698 (6th Cir. 10/11/01)

Failure to Challenge Juror Who Is Child Sex Victim's Mother's Welfare Caseworker

This case does not help clients and illustrates the need for attorneys to consult with clients during voir dire and have clear trial strategy during voir dire. Miller was convicted in Ohio state court of 3 counts of gross sexual imposition and 1 count of raping a minor under the age of 13 based on allegations that he sexually molested a young boy he had befriended. On federal habeas review, he claims that trial counsel was ineffective for failing to challenge a biased juror. During voir dire, juror 12, Patricia Furrow, disclosed she had prior knowledge of the case through her employment at the county social services office. Ms. Furrow said she did not want to discuss the matter in court because of the "Privacy Act." In an *in camera* hearing, in the presence of the judge, prosecutor, defense attorney, and court reporter, she said she was the victim's mother's welfare caseworker. Ms. Furrow said "[Williamson, the victim's mother] had called me very upset and said that this had happened. But no names were used. But I was aware it had happened. . .[she told me] she was having a very hard time. J— had been raped, and she was trying to go through it with him." Furrow said she did not know any details of the rape or investigation. She expressed that it would be uncomfortable for both her and Ms. Williamson to serve on the jury. She also worried that Ms. Williamson would attempt to contact her during the trial: "I guess I just know Cordia. I know she's going to call me as soon as, if I'm on there, I know she's going to call me and, you know, be talking about it and those kinds of things just because Cordia's like that. I know Cordia." Asked by the prosecutor if she could be fair, Furrow said "I—it's tough. I think I could be fair." When asked by the defense attorney if she would find Ms. Williamson more credible, she said "No, I really don't think that I would be biased. Just uncomfortable." She said if a problem arose as a result of sitting as a juror, Ms. Williamson could get a new caseworker. The defense attorney never challenged Ms. Furrow for cause, nor did he use a peremptory on her. In fact, the defense failed to use 2 peremptories. Furrow ultimately acted as foreperson on the jury that convicted Miller of 4 sex crimes. Williamson was a witness for the state.

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Miller filed a petition for post-conviction relief with the trial court. He called as a witness a local criminal defense attorney who testified that trial counsel's decision to leave Furrow on the jury was unreasonable. Shirk, the trial attorney, testified for the state that he and Miller discussed whether to leave Furrow on the jury. He said they decided that Williamson was untruthful and hard to deal with, and that since Furrow knew her well, she probably had the same opinion. Shirk said they had decided she would "bend over backward to be fair to Henry." He could not recall when he consulted with Miller about Henry. In an affidavit, Miller said he was not present during the *in camera* hearing and after the hearing Shirk simply said Furrow "would be good for" Miller. Shirk said when deciding whether to use a peremptory, he had to weigh Furrow against jurors who had not yet been questioned. Miller said he knew nothing about what was said in the hearing. The trial court concluded that Shirk was incompetent for failing to challenge Furrow and granted Miller a new trial. The state appealed and the Ohio Court of Appeals reversed the trial court, holding Shirk's decision to leave Furrow on the jury "bore a reasonable relationship to defense trial strategy."

Court Finds It Was Reasonable Trial Strategy Not To Excuse Furrow

On federal habeas review, the district court affirmed the Ohio Court of Appeals. The 6th Circuit also affirms. The 6th and 14th amendments to the U.S. Constitution guarantee a criminal defendant the right to be tried by impartial and unbiased jurors. Despite that "counsel's actions during voir dire are presumed to be matters of trial strategy…' a strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness.'" *quoting Hughes v. U.S.*, 258 F.3d 453, 457 (6th Cir. 2001). However, trial strategy itself must be objectively reasonable: "it must be within the range of logical choices an ordinarily competent attorney. . . would assess as reasonable to achieve a 'specific goal.'" *Cone v. Bell*, 243 F.3d 961, 978 (6th Cir. 2001).

The Court finds that Shirk was using reasonable trial strategy when it failed to remove Furrow. The Court particularly emphasizes that Shirk said he found Williamson troublesome and he felt that Furrow surely would since she knew Williamson so well, as well as Shirk's impression that Furrow "would bend over backward" to help Miller. Furthermore, to prevail Miller must also prove that Furrow was actually biased against him, and he has failed to do so. Furrow knew no details of the allegations and did not have a close personal relationship with Williamson.

***Hughes v. U.S.* and *Wolfe v. Brigano* Distinguished**

The Court distinguished the case at bar with 2 recent 6th Circuit decisions. First, in *Hughes, supra*, the juror was biased because she specifically stated during voir dire that she could not be fair to the defendant because of her affinity for law enforcement. Furthermore, neither counsel nor the trial court followed up on her statements admitting bias. In this case, Furrow was closely questioned by defense counsel and the court, and she never said that she would be biased. In *Wolfe v. Brigano*, 232 F.3d 499 (6th Cir. 2000), 2 jurors were found to be biased where they had close relationships with the victim's parents. One juror said he could not be fair, and the other juror's assurances that she could be fair were implausible considering her frequent visits with the parents. In the case at bar, there was only a personal relationship, and the Court finds that without anything in the record to support it, it cannot assume that caseworker-client relationships are close and personal. Furrow said she would have no problem facing Williamson should a not guilty verdict be rendered and that if problems did arise she could have Williamson transferred to another caseworker. Furthermore, the Court emphasizes that unlike in *Wolfe*, Furrow had no knowledge of any details of the crime.

Court Acknowledges Attorney Acted Unwisely

Interestingly, the Court never discusses Ms. Furrow's assertions that she would be contacted by Williamson during the trial which would seem to be somewhat important. The Court concludes its opinion by noting "while we may find Shirk's decision to leave Furrow on the jury to be risky or ill-advised, criminal defense lawyers should be given broad discretion in making decisions during voir dire. Few decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors."

Dissent by Chief Judge Martin

Chief Judge Martin strongly dissents. He finds that Furrow had both a presumed and actual bias against Miller. Furthermore the dissent states that Shirk's stated justification for failing to excuse Furrow "bears no logical connection to his defense strategy." The dissent finds that Furrow had a close and ongoing relationship with Williamson. "I simply do not agree that the caseworker/client relationship is so distant that a caseworker could vote to acquit the man accused of raping her client's child without being conflicted as a result of her professional obligations to her client." Furthermore, the dissent has concerns with continuous expressions by Furrow that she would be badgered by Williamson during trial.

Shirk's articulated justification for keeping Furrow on the jury—Shirk's belief that Furrow would find Williamson "incredible"—is suspect because defense strategy at trial never centered on establishing Williamson as unbelievable. Williamson's credibility was not at issue. Although she was a witness it was only to tell the jury that she knew nothing

about her son's relationship with the victim until child social services called her after they had been contacted by an anonymous caller. In sum, Williamson never testified about the circumstances of the alleged rapes nor about the investigation other than to say how she was told about the possible crimes committed against her son. Furthermore, Shirk's questioning of Furrow during voir dire had nothing to do with gauging her perception of Williamson's credibility.

The dissent also finds it troubling that Furrow indicated in her responses to questioning during voir dire that she already believed a rape had definitely occurred. This was critical in that Miller's defense was not that a rape occurred but someone else had committed it, but that no rape ever occurred.

Mitzel v. Tate
2001 U.S. App. LEXIS 21501 (6th Cir. 10/5/01)

Statement to Police After 6th Amendment Right to Counsel Attached

Mr. Mitzel was convicted in Ohio state court of murder. On January 12, 1987, Ohio police received several phone calls from Mitzel expressing concern that his friend Randy Ralston had committed suicide earlier that day. Mitzel told the police that he had dropped Ralston off behind King's Market that afternoon. The police went to the store and saw tire tracks and 2 sets of footprints leading into the woods behind the market, with only 1 set leading out of the woods. In the woods, the officers found Ralston's body. He had been shot twice in the head.

Mitzel came to police headquarters that evening on his own volition. After signing a waiver of rights form, he made a statement to Captain Jacola. He said that earlier that morning Ralston asked him to kill someone for him. Mitzel said he later realized that "someone" was Ralston. He said the last time he saw Ralston was that afternoon when he dropped him off behind King's Market.

After a short break, Jacola asked him to tell the story again. Mitzel gave more details and eventually wrote a statement after signing another waiver of rights form. He said he accompanied Ralston into the woods and Ralston asked him to shoot him. Mitzel declined and Ralston grabbed the gun Mitzel was holding and shot himself once in the head. Unfortunately Ralston, according to Mitzel, did not die but remained conscious. Mitzel asked Ralston if he wanted him to call an ambulance. Ralston declined and instead asked Mitzel to shoot him until he was dead. Mitzel shot him and returned home and called the police.

Jacola then typed up the statement adding in more details including that Mitzel went to his home that afternoon with Ralston to pick up Mitzel's gun and that the two then proceeded to K-Mart to buy shotgun shells. Mitzel signed the statement.

Jacola then asked Mitzel to videotape a statement. Mitzel signed another waiver of rights form and then made the video statement. In it, he admitted that when they first got to the woods, he loaded, cocked, and aimed the rifle at Ralston. Mitzel said he could not bring himself to pull the trigger so he held the stock of the gun for Ralston as Ralston pulled the trigger and inflicted the first gunshot wound.

Mitzel then agreed to an atomic absorption test to determine if he had discharged a gun. The test results were not consistent with Mitzel having used a gun. The same test performed on Ralston did show gunshot residue. Mitzel admitted to taking a shower after the shooting.

Mitzel remained in jail until the next morning when he was arraigned. An attorney, hired by his father, was with him. The attorney agreed to allow the police to administer a polygraph test without the attorney present. After the polygraph was given, the officers told Mitzel that results indicated he had not told "the whole truth." Mitzel said he wanted to tell the whole truth and signed another waiver of rights form. Mitzel said Ralston was unable to pull the trigger himself so he helped pull on Ralston's thumb, which was on the trigger.

The trial court denied Mitzel's motion to suppress all of his statements to police and they all came in at trial. The other state evidence consisted of the pathologist's testimony that he could not state whether death would have occurred without both shots being fired. Mitzel took the stand in his defense and said that he did shoot Ralston in the head after Ralston fired the first shot and that he did so because Ralston asked him to shoot him until he was dead. Mitzel was convicted of murder. The Ohio appeals court affirmed his conviction.

6th Amendment Violated but Error Harmless

On federal habeas review, Mitzel first claims error with the admission of the post-polygraph statement to police. Mitzel specifically argues that police violated his 6th amendment right to counsel when it told him he failed the polygraph and then took a statement from him without his attorney being present. Mitzel signed a waiver of rights form. The Court first notes that this statement was the most damaging to Mitzel as he admitted that he helped Ralston pull the trigger. The district court found that Mitzel's 6th amendment right to counsel was violated when the officers initiated a conversation with Mitzel by telling him he failed the test when the right to counsel had attached but that error was harmless.

Once the 6th amendment right to counsel attached (after adversarial proceedings have been initiated), any attempt by the state to elicit information without an attorney present, even through means that may be permissible under the 5th

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amendment right to counsel prior to the point at which the 6th amendment right attached, is barred. *Michigan v. Jackson*, 475 U.S. 625, 632 (1986). It is undisputed that Mitzel's right to counsel had attached and his father had arranged for him to be represented by an attorney. That attorney did give police permission to conduct a polygraph. The key question is whether the police of Mitzel initiated the post-polygraph conversation. The 6th Circuit finds that the police initiated the conversation and that the 6th amendment has been violated but that the error is harmless.

For error not to be harmless, Mitzel must prove that the "error had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). There must be a "reasonable probability" the result would have been different. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). While the statement made post-polygraph was damaging as to Mitzel's involvement in rendering the first shot, Mitzel had already admitted to his role in the second shot while Ralston was still alive. Further, the medical examiner said both bullet wounds caused death.

Jury Instructions on Aiding and Abetting Suicide Not Warranted Where Defendant Was Active Participant

Mitzel's second argument is that the trial court erred in not instructing the jury on aiding and abetting suicide. The Court of Appeals rejects this argument as well. In Ohio, aiding and abetting suicide is not a crime. Mitzel said his actions only constituted aiding and abetting Ralston's suicide. Unfortunately Mitzel did not request this instruction at trial. The Ohio appellate court examined this issue. It said that Mitzel's behavior was not just that of an "aider" or "abettor" but that of an active participant. His firing of the second shot was not just a continuation of the initial act but "an occurrence separate and apart from the firing of the first shot." Ralston was, according to Mitzel, still alive when he shot him the second time. Furthermore, the Ohio court found it important that the gun was a single-shot gun that required Mitzel to reload. In sum, there was insufficient evidence to support the defendant's theory so the instruction was unwarranted.

Brumley v. Wingard
2001 U.S. App. LEXIS 21697 (6th Cir. 10/11/01)

Showing of Unavailability Required Before Deposition Used in Lieu of Live Testimony of Witness at Trial

Brumley was convicted in Ohio state court of complicity to commit murder and kidnapping in connection with the abduction and murder of Becky Knapp in 1984. He was sentenced to life in prison without the possibility of parole for 30 years. After exhausting state appeals, Brumley filed a petition for writ of habeas corpus in federal district court on 1 ground: whether his confrontation clause rights were violated when the trial court allowed the prosecution to play the videotaped deposition of Tony Kirklin who was incarcerated in Arizona at the time of trial. Tony Kirklin was the brother of Delmar Kirklin, who was charged as the murderer of Knapp. Tony was one of the passengers in the car Delmar was driving on the day of the murder and witnessed the murder of Knapp.

The videotaped deposition occurred in 1989 after Tony was transported from Arizona to testify against his brother at his trial. The trial court presiding over Brumley's case allowed the deposition over defense counsel's objection. The prosecution requested the deposition on the grounds that it would avoid the hassle of transporting Tony a second time, for Brumley's trial; it would save money from transporting Tony again; and third the prosecution feared Tony might be paroled before Brumley's trial.

Tony testified as to the events leading up to Knapp's murder. Knapp was a hitchhiker picked up by several men, including Tony, Brumley, and Delmar, and murdered. According to Tony, both Brumley and Delmar spent time alone with Knapp before she was murdered in the backseat of a car. Delmar said she had "seen too much" when she saw the license plates of the car. Tony said Brumley pointed a gun at Knapp, but then gave the gun to Delmar and told him to "waste her." Her body was then hidden in a secluded spot in the woods. Defense counsel for Brumley objected to portions of the testimony and cross-examined Tony.

At Brumley's trial, the prosecution moved to introduce the deposition because Tony was still incarcerated in Arizona. The deposition had been edited and objections and rulings had been removed. Over defense counsel's objection, the deposition was played for the jury.

Two other prosecution witnesses' testimony is important to the issue in this case. Davis, another passenger in the car, who ran away before the shooting, said he heard shots fired. Another witness, Donald Sanders, was incarcerated with both Delmar and Brumley, and testified as to incriminating statements made by Brumley.

The Ohio appeals court that reviewed the case held that no confrontation clause violation occurred because the tape was reliable. The federal district court disagreed and held that a confrontation clause violation occurred because there was no evidence that Tony was unavailable. Further the court found that error was not harmless because without Tony's testimony, Brumley could not have been convicted of murder. The court ordered a new trial on the murder conviction, but did not reverse the kidnapping conviction as Tony's testimony was harmless as to that conviction.

The 6th Circuit affirms the district court's grant of the petition of writ of habeas corpus. The trial court went directly against

Ohio v. Roberts, 448 U.S. 56 (1980), when it allowed the videotaped deposition to be admitted in lieu of live testimony where there has been no showing of unavailability. A finding of unavailability is required by *Roberts*. The state court of appeals also violated existing Supreme Court law when it found that a showing of unavailability is necessary because it believed videotaped testimony is inherently reliable. In essence, the state appellate court *refused* to apply *Roberts*! *Roberts* requires a showing of reliability *after* the offering party has proven the unavailability of a witness. It is a separate, and additional, requirement to the showing of unavailability. While the Ohio criminal rules may have been satisfied without a showing of unavailability, the constitutional requirements were not, and they cannot be dispensed with by state courts.

Unavailability Not Satisfied by Mere Presence in Another State

For a witness to be unavailable, "prosecutorial authorities [must] have made a good faith effort to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724-725 (1968). In *Barber*, which also involved a state witness incarcerated in another state, the Supreme Court held that it was not enough for authorities to merely "ascertain that he was in a federal prison outside Oklahoma." *Id.*, 390 U.S. at 723. "The right of confrontation may not be dispensed with so lightly." *Id.*, 390 U.S. at 725. In the case at bar, Tony was available to testify under the *Barber* rule. His attendance could have been secured through the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which had been enacted by both Ohio and Arizona.

Reliability of Deposition is Not Controlling- Goal Is to Provide "Face-to-Face Confrontation"

The fact that videotaped deposition was prepared specifically for Brumley's trial is irrelevant. While this does "support the state courts' conclusion that the videotaped deposition was reliable, [this does not] address the Confrontation Clause's 'preference for face-to-face confrontation at trial.'" *quoting Roberts*, 448 U.S. at 63.

The court notes that a primary purpose behind the confrontation clause is to force a witness "to stand face to face with the jury." *U.S. v. Mattox*, 156 U.S. 237, 242-243 (1895). This purpose is not served by the use of a deposition. Furthermore, the 6th Circuit rejects the state's argument that this case is similar to *Maryland v. Craig*, 497 U.S. 836 (1990), by emphasizing that *Craig* only provides for the use of closed-circuit TV testimony where the court has made a "case-specific finding of necessity" based upon the particular child witness. This is a very narrowly drawn exception to the general rule. The compelling state interest in cases contemplated by the *Craig* court are protecting child sex abuse victims while the state's interest in the case at bar was "administrative convenience and budgetary concerns**."**

Error Not Harmless Where Testimony is Only Evidence of Complicity to Murder

The use of the deposition in lieu of trial testimony by Tony was not harmless. Tony was the only witness to say that he saw Brumley give Delmar the murder weapon. He was the only witness who heard Brumley saw "waste her." This is the only evidence that Brumley was a complicitor to Knapp's murder. Davis did not witness the shooting so he has no knowledge of the events immediately prior to Knapp's murder. Sanders', the jailhouse informant, testimony is "incoherent and establishes (at most) that Brumley said the Kirklin shot Knapp."

Dissent by District Judge Rosen

District Court Judge Rosen dissents at length. He emphasizes that the deposition testimony of Tony was actually quite trial-like in that there was a galley of witnesses and it was in the actual courtroom where Brumley was later tried. Further, the deposition occurred only a month prior to trial. Finally, all participants knew that this was going to definitely be used at trial and there were no intervening developments that would require further examination of Tony.

The dissent also points to language in *Roberts* where the Supreme Court said that a "demonstration of unavailability... is not always required." *Roberts*, 448 U.S. at 65, n.7. Also, the dissent believes that there is a difference between prior statements made in a "non-trial" context and those statements made in a trial-like setting. The deposition in the case at bar is not "inferior" evidence so a showing of unavailability is not required. The dissent also believes that the state's interests in this case may be as compelling as those in *Craig* so as to allow evidence which may not have afforded the defendant full confrontation rights. ■

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Immigration Pathfinder

MATERIALS ON: **Representing Non-US Citizens**

The following is a listing of DPA library's resources on issues relating to the representation of Non-US citizens. This is a fairly new area for us and our resources are limited, but we want you to be aware that we have at least some materials available. Please see one of the librarians, Will Hilyerd or Sara King, for help with locating additional sources, such as journal articles or Internet resources.

BROWSING AREAS:

The DPA uses the Library of Congress classification system. DPA has a limited number of books on representation of Non-US citizens, but other law libraries such as UK, U of L and Northern Ky. (or your local law library) also use the Library of Congress Classification systems and have a better selection. You can locate books on the representation of Non-US citizens in the KF 4790 - KF 4860 range in these other law libraries.

UK's library catalog can be found on the Internet at: http://infokat.uky.edu/.

U of L has its catalog available at: http://minerva.louisville.edu/ and

NKU's catalog can be accessed at: http://nku.kyvl.org/

BOOK LIST:

All DPA staff have borrowing rights in the main library. People not affiliated with the DPA may also be allowed to borrow. This is decided on a case-by-case basis.

Immigration Law and Crimes. (New York: Clark Boardman Callahan) [1984: loose-leaf] **KF 4819 .I472 1984**

Representing Noncitizen Criminal Defendants in New York State. 2nd ed. Vargas, Manuel D. (Albany, N.Y. : New York State Defenders Association, Criminal Defense Immigration Project) [2000] **KFN 5698 .Z9 V37 2000**

PERIODICALS:

DPA does not currently carry any periodicals on representing Non-US citizens, but occasionally good articles turn up in more general publications such as *ABA Journal* and NACDL's *The Champion.*

DPA TRAINING VIDEOS:

Videos may be accessed by contacting either of the DPA librarians. As originals do not circulate, the librarians will arrange for the tape to be copied. DPA offices and divisions will be charged for the cost of the tape (billed directly to the office or division account). Others will be asked to reimburse the cost of the tape and the cost of shipping. **Under no circumstances should prosecuting attorneys be allowed to view DPA produced videotapes.** An index to the training video and handout libraries is available on the Library's Intranet page.

Videos

- V-1006: International Law. Roberta Harding.
- V-1046 & V-1047: A Babble of Voices: Protecting Your Non-English Speaking Client's Constitutional Rights. 29th Annual Public Defender Conference: 2001. Karen Maurer, Isabel Framer, & Kathy Schiflett. Accompanies H-760 & H-792.
- V-1065: Defendant and Immigration Law. 29th Annual Public Defender Conference: 2001. Dan Goyette, Dan Kesselbrenner, David Funke, Ron Russell Accompanies H-755.

Handouts

All handouts are available to DPA staff via the library page of the DPA Intranet. If you are unsure how to access the Intranet, please contact the DPA computer department. Defense attorneys not affiliated with DPA may request copies of handouts by contacting either Will Hilyerd or Sara King. Please see below for contact information.

- H-751: Incorporating International Law into Capital Defense Litigation. DPA Death Penalty Institute: 2000. Roberta M. Harding. 91 p.
- H-755: The Criminal Defendant and Immigration Law: What Every Public Defender Should Know Before Undertaking Representation of an Illegal Alien. 29th Annual Public Defender Conference: 2001. Dan Kesselbrenner. 9 p. Accompanies V-1065.
- H-760: A Babble of Voices: Protecting Your Non-English Speaking Clients Constitutional Rights. Kathy Schiflett. 55 p. Accompanies V-1046 & V-1047.
- H-792: Standards, Training and Certification of Interpreters. Isabel Framer. 63 p. Accompanies V-1046 & V-1047.

INTERNET RESOURCES:

The Internet (accessible from all DPA offices via Microsoft Internet Explorer) is a tremendous source of information. It should, however, be used with certain caution - - remember to check when the information was last updated and make sure

you use a site whose authority on the subject you can trust. Persons not associated with DPA can contact their local University or Public librarian(s) for assistance if they are unsure of how best to locate information on the Internet.

LEXIS RESOURCES: http://www.lexis.com; http://www.lexisone.com

In addition to case and statutory materials, Lexis offers access to several searchable databases that contain information on the representation of Non-US citizens. Please remember that these databases carry extra charges for DPA. You must obtain your supervisor's permission prior to accessing them as the charges will be billed back to your office. Contact one of the DPA librarians for assistance or further information about these databases.

OTHER ELECTRONIC RESOURCES:

We also currently subscribe to the FirstSearch online service. This service includes Worldcat, which provides access to numerous library catalogs and databases nationwide.

DPA has done two publications on representing Non-English speaking clients. Our May Advocate (http://www.dpa.state.ky.us/library/advocate/may01) featured information on dealing with non-English speaking clients and our interpreter manual reproduced some of the articles from that issue as well as other resources.

Contact the DPA librarians to obtain information from, or more information about, these resources. ■

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PRACTICE CORNER

LITIGATION TIPS & COMMENTS COLLECTED BY MISTY DUGGER

Misty Dugger

A common area of confusion for many trial attorneys is the preservation of error occurring during jury selection. As you will see below, voir dire issues must be properly and specifically preserved for review or they risk being rejected by the appellate courts.

When In Doubt Refer To *Springer* Chart To Determine Number of Peremptory Strikes

In *Springer v. Commonwealth*, Ky., 998 S.W.2d 439, 444 (1999), the Kentucky Supreme Court specifically outlined the number of peremptory strikes granted to each side pursuant to RCr 9.40:

> "[T]he basic entitlement to peremptory challenges under RCr 9.40(1) is eight for the Commonwealth and eight for the defense. If more than one defendant is being tried, the defendants are entitled to a total of ten peremptory challenges: eight to be exercised jointly pursuant to RCr 9.40(1), and one each to be exercised independently pursuant to RCr 9.40(3). If one or two additional (alternate) jurors are seated, the defendants are entitled to a total of thirteen peremptory challenges: nine to be exercised jointly pursuant to RCr 9.40(1) and (2); one each to be exercised independently pursuant to RCr 9.40(3); and an additional one each to be exercised independently pursuant to RCr 9.40(2):
>
> RCr 9.40(1) – 8 (per side)
> RCr 9.40(3) – 2 (one per defendant if tried jointly)
> RCr 9.40(2) – 1 (one "each side" if alternate jurors seated)
> RCr 9.40(2) – 2 (one "each defendant" if alternate jurors seated)."

Not only must trial counsel object to the allocation, but counsel must also specifically state that the defendant is entitled to the peremptory challenges. A blanket request for more peremptory strikes is insufficient to preserve the issue. *See Lawson v. Commonwealth*, below. Always remember to OBJECT and specifically say that they are ENTITLED to the peremptory strikes. Otherwise, the issue is not preserved!

~ John Palombi & Misty Dugger, Appeals Branch

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Improper RCr 9.40 Allocation Constitutes Reversible Error Only When Preserved By A Contemporaneous Objection

In *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001), the Court stated:

> "Lawson argues that his conviction must be reversed because the trial court erroneously allowed him to exercise only nine (9) peremptory challenges instead of the ten (10) peremptory challenges which this Court has interpreted RCr 9.40 to require when the trial court seats an additional juror. Lawson, however, admits that he made no objection to the trial court's allocation of peremptory challenges, and this Court has consistently held that an improper RCr 9.40 allocation constitutes reversible error only when preserved for appellate review by a contemporaneous objection. We thus decline to review Lawson's final allegation of error."

In *Woodall v. Commonwealth* 1998-SC-0755-MR, rendered August 23, 2001, (not yet final), the Court acknowledged that the defense is entitled to 10 peremptory challenges when there is a single defendant and an alternate juror is seated:

> "Woodall argues that because each side received ten peremptory challenges, he was entitled to have one more than the prosecution relying on *Springer v. Commonwealth*, Ky., 998 S.W.2d 439 (1999). *Springer*, *supra*, involves a situation where the defendants did not get the proper number of peremptory challenges. There is no constitutional right to peremptory challenges. (citations omitted)
>
> Here there was no objection to each side getting ten strikes. Peremptory challenge claims are waived once the jury is sworn at trial. (citations omitted) The trial judge equalized the number of challenges but did not reduce those available to Woodall. He received what he was entitled to under the rules. RCr 9.40. *Springer* only applies when there is more than one defendant and, therefore, has no application here."

~ Richard Hoffman, Appeals Branch

Remember - Record must reflect specific reasons for venire person to be stricken and harm to defendant

In *Stone v. Commonwealth*, 1999-SC-1128-MR, rendered August 23, 2001, (not to be published), venire person X stated that he was a "close, personal friend of the prosecutor" and that the prosecutor "is my attorney in other cases." The defense attorney moved to excuse venire person X for cause, and was overruled. At the end of voir dire, the defense attorney approached the bench, and stated for the record that he believed that venire person X should have been excused for cause, and because the judge would not do so, the defense attorney had to use a peremptory challenge on venire person X. He further stated that had he not had to use a peremptory challenge on venire person X, he would have used it to strike Ms. Y, and Ms. Y ended up being on the jury.

The Supreme Court affirmed the conviction, stating the defense attorney failed to establish whether the prosecutor was representing the venire person at the time of voir dire. Further defense counsel failed to show whether the motion to excuse the juror was based upon a current or previous relationship between the prosecutor and the venire person. And finally, the defense counsel did not establish whether the juror would seek representation from the prosecutor in the future.

~Shannon Dupree Smith, Appeals Branch

Practice Corner needs your tips, too.

If you have a practice tip, courtroom observation, or comment to share with other public defenders, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Mdugger@mail.pa.state.ky.us. ■

Our future is limited by the world that we first create in our own minds. We can never accomplish what we can't first imagine.

— Bill Bishop

The Reflections and Tips of a Recruit

Gill Pilati

SO YOU WANT TO BE A DPA LAW CLERK?

I suppose I probably had the longest DPA interview in history, since I interviewed for the first time with Gill Pilati and Tom Collins in the Fall of 2000. At that time, there was not a job opening, so I came back to interview with Gill in the Spring of 2001. So, Tip #1 is, Persistence Pays Off, which leads directly into Tip # 2, Don't Be Afraid to Beg! I knew after hearing the presentation by the Directors in the Fall of 2000, that I wanted an opportunity to work with a group of people who were inspired and inspiring about what it is they do for a living. Law School often exposes you to a very cynical view of the law. This group of people was a refreshing change. So, I guess Tip #3 would have to be, Attend the Presentation and Catch the Enthusiasm.

Tip #4, Be Prepared to Learn. I knew from the beginning that my experience with DPA was going to be unlike the clerkships and summer associate positions I heard about from my peers. The cases were "ripped from the headlines" and there is always the sense that what you are working on makes a difference to real people and the consequences are staggering. The great part about this learning environment, which sets it apart from most others, is that there was no condescension to my "lowly law student" status. It is a great opportunity to "try on" all those theories I learned in class, to find out that I knew more than I realized and to soak up experiences from people who are experts at what they do. By the way, I learned more about evidence in 3 weeks here, than in a semester in law school.

Gov. Paul Patton and Jimmy Schaffer

Tip #5, Don't Miss the Opportunity! This is a great experience for any law student. The variety of cases is stimulating and the people you work with are a diverse group of experts in trial work, appeals, post-conviction, and Kentucky and Federal Constitutional Law. If you want hands-on learning, you can learn from the best.

— Jimmy Schaffer, JD 2002

Defender Statewide Employment Opportunities

Currently we have the following opening available for a Juvenile Post Disposition Branch Manager. See http://dpa.state.ky.us/career.htm for more info. If you are interested in this position or know of someone that may be interested , please contact:

Gill Pilati
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40602
Tel: 502-564-8006; Fax: 502-564-7890
E-mail:gpilati@mail.pa.state.ky.us ■

THE ADVOCATE

Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

Address Services Requested

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Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

Annual Conference
Covington, KY
June 2002

Litigation Practice Institute
Kentucky Leadership Center
Faubush, KY
October 6-11, 2002

NOTE: DPA Education is open only to criminal defense advocates.

For more information:
http://dpa.state.ky.us/train/train.htm

For more information regarding KACDL programs call or write: Denise Stanziano, 184 Whispering Oaks Drive, Somerset, Kentucky 42503, Tel: (606) 676-9780, Fax (606) 678-8456, E-mail: KACDLassoc@aol.com

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For more information regarding NLADA programs call Tel: (202) 452-0620; Fax: (202) 872-1031 or write to NLADA, 1625 K Street, N.W., Suite 800, Washington, D.C. 20006;
Web: http://www.nlada.org

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For more information regarding NCDC programs call Rosie Flanagan at Tel: (912) 746-4151; Fax: (912) 743-0160 or write NCDC, c/o Mercer Law School, Macon, Georgia 31207.

**** NLADA ****

Life in the Balance
Kansas City, MO
March 9-12, 2002

Defender Advocacy Institute
Dayton, OH
May 31 - June 5, 2002

Annual Conference
Milwaukee, WI
Nov. 13-16, 2002